TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1926

No. [redacted] 136

NORTHERN RAILWAY COMPANY, PETITIONER,

vs.

DONALD PAGE ET AL., ADMINISTRATORS OF THE ESTATE OF MICHAEL P. RYAN, DECEASED.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE [redacted] CIRCUIT.

PETITION FOR CERTIORARI FILED JUNE 3, 1926.

CERTIORARI GRANTED OCTOBER 11, 1926.

(31,262)

(31,252)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 529

NORTHERN RAILWAY COMPANY, PETITIONER,

vs.

DONALD PAGE ET AL., ADMINISTRATORS OF THE ESTATE OF MICHAEL B. RYAN, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

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[fol. 1] **IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT, OCTOBER TERM, 1923**

No. 1771

DONALD PAGE et al., Administrators, Plaintiffs, Plaintiffs in Error,

v.

UNITED FRUIT COMPANY et al., Defendants, Defendants in Error

WRIT OF ERROR

UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable the Judge of the District Court of the United States for the District of Massachusetts; Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, between H. Anton Bock and Donald Page, both of Milford, in the State of Connecticut, administrators of the estate of Michael B. Ryan, deceased, plaintiffs, and the United Fruit Company, a corporation duly organized under the laws of the State of New Jersey, and having a usual place of business in Boston, in said District of Massachusetts, and Northern Railway Company, a corporation duly organized under the laws of the State of New Jersey, and having a usual place of business in Boston, in the District of Massachusetts, defendants, a manifest error hath happened, to the great damage of the said plaintiffs, as by their complaint appears: We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and [fol. 2] openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the First Circuit, together with this writ, so that you have the same at the city of Boston, Massachusetts, on the second day of June next, in the said Circuit Court of Appeals, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the second day of May in the year of our Lord one thousand nine hundred and twenty-four.

John E. Gilman, Jr., Deputy Clerk of the District Court of the United States for the District of Massachusetts.

Allowed by J. M. Morton, Jr., U. S. District Judge.

IN UNITED STATES CIRCUIT COURT OF APPEALS

RETURN TO WRIT OF ERROR

DISTRICT COURT OF THE UNITED STATES,
District of Massachusetts, ss:

And now, here, the Judge of the District Court of the United States, in and for the District of Massachusetts, makes return of this writ by annexing hereto and sending herewith under the seal of the said District Court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the United States Circuit Court of Appeals for the First Circuit, as within commanded.

In testimony whereof, I, James S. Allen, Clerk of said District Court of the United States, in and for the District of Massachusetts, have hereto set my hand and the seal of said court this thirtieth day of June, A. D. 1924.

James S. Allen, Clerk. (Seal.)

[fol. 3] IN UNITED STATES DISTRICT COURT, DISTRICT OF MASSACHUSETTS

No. 1425, Law Docket

H. ANTON BOCK and DONALD PAGE, Administrators of the Estate of Michael B. Ryan, Plaintiffs,

v.

UNITED FRUIT COMPANY and NORTHERN RAILWAY COMPANY OF COSTA RICA, Defendants

WRIT OF ATTACHMENT—Filed March 11, 1921

MASSACHUSETTS DISTRICT, ss:

[SEAL.]

The President of the United States of America to the Marshal of our District of Massachusetts or his deputy, Greeting:

We command you to attach the goods or estate of United Fruit Company, a corporation duly organized under the laws of the State of New Jersey, and having a usual place of business in Boston, in said District of Massachusetts, and Northern Railway Company, a corporation duly organized under the laws of the State of New Jersey, and having a usual place of business in Boston, in our District of Massachusetts, defendants, to the value of fifty thousand ($50,000) dollars, and to summon the said defendants (if they may be found in your District,) to appear before our Judge of our District Court, next to be holden at Boston, within and for our said District of

Massachusetts, on the third Tuesday of March, 1921. Then and there, in our said Court, to answer unto Michael B. Ryan of Milford, in the State of Connecticut, Plaintiff, in an action of Contract or Tort. To the damage of the said Michael B. Ryan (as he says) the [fol. 4] sum of fifty thousand dollars, which shall then and there be made to appear, with other due damages. And have you there this writ, with your doings therein.

Witness, the Honorable James M. Morton, Jr., at Boston, the fifth day of January in the year of our Lord one thousand nine hundred and twenty-one.

Frank H. Mason, Deputy Clerk

ACCEPTANCE OF SERVICE OF WRIT

Boston, January 5, 1921.

We hereby accept service of the within writ.

United Fruit Co., by John L. Warren, Assistant Secretary.
Northern Railway Co., by Arthur E. Nicholson, Assistant Secretary.

IN UNITED STATES DISTRICT COURT

BILL OF COMPLAINT—Filed March 11, 1921

And the plaintiff says that on the twenty-third day of February, 1918, the plaintiff was accepted as a passenger on a train upon a railroad located in the Republic of Costa Rica, owned by the defendant Railway Company, and operated by both defendants, at which time said train was proceeding from San Jose to Limon in said Costa Rica, both stations being on the line of said railroad, and while the plaintiff was upon said train as aforesaid, and in the exercise of due care, at or near the station of Turrialba in said Costa Rica, the defendant negligently exposed the plaintiff to an attack with fire arms by military troops, then and there being carried upon another train coming from the opposite direction; and the plaintiff avers that the train upon which he was riding and the train upon which the attacking troops were being carried were then and there both being operated by the defendants, and were under their control and management; and that the plaintiff by reason of and in the course of said attack was shot and sustained great and permanent bodily injuries, including the total loss of sight of one eye and partial loss of sight of the other [fol. 5] eye, and has been put to much and long physical and mental suffering and great expense.

By His Attorneys, Charles F. Perkins, Paul F. Perkins.

IN UNITED STATES DISTRICT COURT

MINUTE ENTRY

Upon the filing of the writ and declaration herein an order to plead was entered.

The cause was thence continued to the March Term of this court, A. D. 1921, when, to wit, March 29, 1921, the following Answer was filed:

ANSWER—Filed March 28, 1921

[Memorandum.—Copy of answer is here omitted as it was subsequently stricken out and a substitute answer was filed and allowed and will be found hereafter. James S. Allen, Clerk.]

This cause was thence continued to the June Term, A. D. 1921, when, to wit, September 6, 1921, the following Motion for Specifications was filed by the defendant.

IN UNITED STATES DISTRICT COURT

MOTION FOR SPECIFICATION—Filed September 6, 1921

The defendant moves that the plaintiff specify in what respect or respects the defendant was negligent in exposing the plaintiff to an attack with fire arms by military troops.

By Its Attorneys, Storey, Thorndike, Palmer & Dodge.

This cause was thence continued from term to term to the December Term, A. D. 1921, when, to wit, March 6, 1922, the following motion to amend plaintiffs declaration was filed and allowed by consent:

IN UNITED STATES DISTRICT COURT

MOTION TO AMEND BILL OF COMPLAINT—Filed and allowed by consent March 6, 1922

Now comes the plaintiff and moves to amend his declaration.

First. By substituting for the word "defendant" the word "defendants" in the ninth line of page 1 of the declaration.

[fol. 6] Second. By adding to the declaration the following:

"Count 2 being for the same cause of action as Count 1."

Count 2. And the plaintiff says that on or about the twenty-third day of February, 1918, the plaintiff was accepted as a passenger on a train upon the railroad located in the Republic of

Costa Rica, owned by the defendant Railway Company, and operated by the defendants, at which time said train was proceeding from San Jose to Port Limon in said Costa Rica, both stations being on the line of said railroad; that the defendants, by their officers, agents and servants, knowingly suffered and permitted certain armed men, then engaged in a military insurrection against the duly established Government of said Costa Rica, and knowing at the time that said armed men were insurrectionists against said Government and intended to make war thereon and to attack with force the military troops of said Government, to embark on said train at or near the station of Turrialba and to proceed thereon toward Port Limon while the plaintiff was still aboard said train as a passenger as aforesaid, and was a non-combatant and a citizen of the United States, and known by said defendants to be such non-combatant and citizen of the United States; that at the same time said train was proceeding toward Port Limon over said railroad, and operated, as aforesaid, by said defendants, said defendants, by their duly authorized agents and servants, were operating another train transporting military troops of the said Government of Costa Rica over said railroad from said Port Limon towards said Turrialba, that said defendants well knew or with the exercise of due care would have known that the said Government troops and their commander were informed and knew of the presence of the said insurrectionists on board said train when it left Turrialba; that both said trains met at Pascua Siding, a station on said railroad, at which time said Government troops and their commander believing that said insurrectionists were still aboard said train on which they embarked, were prepared to attack the latter train at sight; that the plaintiff was not informed by the defendants or others, and had no [fol. 7] knowledge that the Government troops were aboard a train on said railroad and proceeding towards the train on which the plaintiff was a passenger; that said two trains arrived along side each other at said Pascua Siding, and immediately thereupon the Government troops opened fire upon the train upon which the plaintiff was riding, whereby the defendants negligently exposed the plaintiff while in the exercise of due care to the said attack in which the plaintiff was shot by the said Government troops and sustained great and permanent bodily injuries, including the total loss of sight of one eye and partial loss of sight of the other eye, and has been put to much and long physical and mental suffering and great expense.

Third. By adding to the declaration the following:

"Count 3 being for the same cause of action as Counts 1 and 2."

Count 3. And the plaintiff says that on or about the twenty-third day of February, 1918, the plaintiff was accepted as a passenger on a train on a railroad located in the Republic of Costa Rica, owned by the defendant Railway Company, and operated by the defendant United Fruit Company, at which time said train was proceeding from San Jose to Port Limon in said Costa Rica, both stations be-

ing on the line of said railroad; that the defendant United Fruit Company, by its officers, agents and servants, knowingly suffered and permitted certain armed men, then engaged in a military insurrection against the duly established Government of said Costa Rica, to embark on said train at or near the station of Turrialba and to proceed toward Port Limon while the plaintiff was still aboard said train as a passenger as aforesaid, and was a non-combatant and a citizen of the United States, and known by said defendant United Fruit Company to be such non-combatant and citizen of the United States; that said defendant United Fruit Company well knew that said armed men, at the time they embarked on said train as aforesaid, were insurrectionists against said Government and intended to make war thereon and to attack with force the military troops of said Government; that at the same time said train was proceeding toward Port Limon over said railroad, and operated, as aforesaid, [fol. 8] by said defendant United Fruit Company, said United Fruit Company, by its duly authorized agents and servants, was operating another train transporting military troops of the said Government of Costa Rica over said railroad from said Port Limon towards said Turrialba; that said defendant United Fruit Company well knew or with the exercise of due care would have known that the said Government troops and their commander were informed and knew of the presence of the said insurrectionists aboard said train when it left Turrialba; that both said trains met at Pascua Siding, a station on said railroad, at which time said Government troops and their commander, believing that said insurrectionists were still aboard said train on which they embarked, were prepared to attack the latter train at sight; that the defendant was not informed by the United Fruit Company or others, and had no knowledge that the Government troops were aboard a train on said railroad and proceeding towards the train on which the plaintiff was a passenger; that said two trains arrived alongside each other at said Pascua Siding, and immediately thereupon the Government troops opened fire upon the train upon which the plaintiff was riding, whereby the defendant United Fruit Company negligently exposed the plaintiff while in the exercise of due care to the said attack in which the plaintiff was shot by the said Government troops and sustained great and permanent bodily injuries, including the total loss of sight of one eye and partial loss of sight of the other eye, and has been put to much and long physical and mental suffering and great expense.

By His Attorneys, Charles F. Perkins, Perkins, Haskell & Perkins.

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S SPECIFICATIONS—Filed March 6, 1922

Now comes the plaintiff and specifies that the acts of negligence of the defendants relied upon in the first count of the declaration [fol. 9] consist of causing the two railroad trains referred to in the

declaration to meet, knowing that the attacking troops had reasonable cause to believe that the train upon which the plaintiff was a passenger was transporting armed enemy forces.

And the plaintiff further specifies that the defendants knowing that the Government troops and their commanders had reasonable cause to believe that armed insurrectionists against the government of Costa Rica were aboard the train on which the plaintiff was a passenger, and having ample opportunity to communicate with them before the meeting of said two trains, were negligent by failing and refusing seasonably and promptly to communicate to the said Government troops or their commanders knowledge of the fact that said armed insurrectionists had left the train on which the plaintiff was a passenger before the meeting of said two trains, and by refusing to permit the plaintiff to use the defendants' telephone and telegraph lines to communicate with the United States Consul at Port Limon and with the chief officers of said defendant companies before the meeting of said two trains.

By His Attorneys, Charles F. Perkins, Perkins, Haskell & Perkins.

IN UNITED STATES DISTRICT COURT

MINUTE ENTRIES

This cause was thence continued to the March Term, A. D. 1922, when, to wit, May 24, 1922, issue having been joined, a jury was duly empanelled to try the issue, the Honorable James M. Morton, Jr., District Judge, sitting.

This cause was thence committed to the jury as to the defendant Northern Railway Company at Costa Rica, but jury being unable to agree the papers are taken from them.

On the thirty-first day of said May, the jury returned the following verdict, as of May 24, 1922, by direction of the court, for the United Fruit Company:

IN UNITED STATES DISTRICT COURT

VERDICT—May 31, 1922, as of May 24, 1922

The jury find for the defendant the United Fruit Company.

Wallace G. Hathaway, Foreman.

[fol. 10] IN UNITED STATES DISTRICT COURT

MINUTE ENTRIES

At the same term, to wit, June 26, 1922, a draft bill of exceptions was filed by the plaintiff.

Also at the same term, to wit, September 8, 1922, a motion to amend the bill of exceptions was filed by consent.

This cause was thence continued to the September Term, A. D. 1922, when, to wit, September 15, 1922, the aforementioned motion to amend bill of exceptions and plaintiff's bill of exceptions were allowed by the court.

This cause was thence continued from term to term to the March Term, A. D. 1923, when, to wit, May 1, 1923, the following Motion to Amend Answer and Defendants' Substituted Answer was filed and allowed:

IN UNITED STATES DISTRICT COURT

MOTION TO AMEND ANSWER—Filed and Allowed May 1, 1923

The defendants move to amend their answer by striking out the whole thereof and by substituting the annexed "Substituted Answer.

By Their Attorneys, Storey, Thorndike, Palmer & Dodge.

IN UNITED STATES DISTRICT COURT

SUBSTITUTED ANSWER—June 10, 1924

The defendants deny each and every allegation in the plaintiff's declaration contained.

Further answering the defendants say that the plaintiff had assumed the risk of injuries of the kind, and occasioned in the manner, referred to in the declaration.

Further answering the defendants say that the plaintiff has received the sum of ten thousand dollars from the Republic of Costa Rica as compensation for the injuries referred to in the declaration, and has given a release to the said Republic and for that reason cannot maintain this action.

Further answering the defendants say that the plaintiff never had a cause of action under the law of the Republic of Costa Rica, and [fol. 11] that if he ever had such cause of action it is now prescribed under said law.

By Their Attorneys, Storey, Thorndike, Palmer & Dodge.

IN UNITED STATES DISTRICT COURT

MINUTE ENTRY

On the said first day of May a jury was duly empanelled to try the issue against the defendant the Northern Railway Company of Costa Rica, the Honorable James M. Morton, Jr., District Judge, sitting.

On the third day of said May this cause was committed to said jury to whom the following questions were put and answered by them as follows:

IN UNITED STATES DISTRICT COURT

SPECIAL FINDINGS OF JURY—May 3, 1923

The following special questions are put to the jury and answered by them as follows:

1. Was the plaintiff injured by negligence on the part of the Northern Railway Company or its officers or employees?

The jury answer: Yes.

2. If so, what are the plaintiff's damages?

The jury answer: $35,000, less 10,000—$25,000.

Clarence D. Mixter, Foreman.

On the said third day of May, after hearing all matters and things concerning the same, the jury returned the following alternative verdict against the defendant Northern Railway Company of Costa Rica:

IN UNITED STATES DISTRICT COURT

ALTERNATIVE VERDICT—May 3, 1923

The jury find for the plaintiff and assess damages in the sum of twenty-five thousand (25,000) dollars.

But if, as a matter of law, the plaintiff is not entitled to a verdict, then the jury find for the defendant the Northern Railway Company, and consent that this verdict may be entered on order [fol. 12] of the United States District Court for the District of Massachusetts, or of the United States Circuit Court of Appeals for the First Circuit, or of the Supreme Court of the United States, with same effect as if returned by them.

Clarence D. Mixter, Foreman.

On the fifth day of May, A. D. 1923, the following motion of defendant Northern Railway Company of Costa Rica that alternative verdict be entered was filed.

IN UNITED STATES DISTRICT COURT

MOTION TO ENTER ALTERNATIVE VERDICT—Filed May 5, 1923

The defendant moves that the verdict of the jury for the plaintiff be set aside as not warranted in law and that the alternative verdict for the defendant be entered in place thereof.

Storey, Thorndike, Palmer & Dodge, R. G. Dodge, Attorneys for the Defendant.

IN UNITED STATES DISTRICT COURT

MINUTE ENTRIES

At the same term, to wit, June 25, 1923, this cause was set down for hearing by the court on the motion to set aside verdict for plaintiff and to enter alternative verdict for defendant.

This cause was thence continued under advisement to the June Term, A. D. 1923, when, to wit, September 6, 1923, a memorandum of decision on motion to set aside verdict was announced.

On the said sixth day of September, it was ordered by the court that the verdict for plaintiff be set aside and the alternative verdict for defendant Northern Railway Company of Costa Rica be entered.

At the same term, to wit, September 10, 1923, a claim of exception from order setting aside verdict for plaintiff was filed.

This cause was thence continued to the September Term, A. D. 1923, when, to wit, October 29, 1923, a draft bill of exceptions was filed by plaintiff.

This cause was thence continued to the present December Term, A. D. 1923, when, to wit, December 22, 1923, the following suggestion of death of plaintiff and motion to join administrators is filed:

[fol. 13] IN UNITED STATES DISTRICT COURT

SUGGESTION OF DEATH OF PLAINTIFF AND MOTION TO JOIN ADMINISTRATORS AND ORDER THEREON—Filed December 22, 1923

Now come H. Anton Bock and Donald Page, both of Milford, in the State of Connecticut, and show that the plaintiff, Michael B. Ryan, in the above-entitled case died on the thirty-first day of October, 1923, and that they were duly appointed administrators of the estate of said Michael B. Ryan on the tenth day of December, 1923, and have accepted said appointment and executed a bond according to law.

Wherefore, they move this Honorable Court that the above-entitled action may be revived and that they may be joined as plaintiffs and permitted to prosecute this action.

By Their Attorney, Charles F. Perkins.

January 31, 1924.

MORTON, J.: Motion allowed and H. Anton Bock and Donald Page, as administrators of plaintiff, admitted as parties plaintiff.

Attest: John E. Gilman, Jr., Deputy Clerk.

IN UNITED STATES DISTRICT COURT

MINUTE ENTRIES

On the thirty-first day of January, A. D. 1924, the foregoing motion is allowed by the court and H. Anton Bock and Donald Page as administrators of plaintiff are admitted as parties plaintiff.

On the twelfth day of March, A. D. 1924, a substitute bill of exceptions is filed by the plaintiff and allowed by the court.

On the seventeenth day of March, A. D. 1924, the following judgment is entered:

IN UNITED STATES DISTRICT COURT

JUDGMENT—March 16, 1924

And now, to wit, March 16, 1924, it is considered by the court, pursuant to verdict entered May 3d, 1922, that H. Anton Bock and Donald Page, administrators of the estate of Michael B. Ryan, plaintiffs, take nothing by their said writ and that the defendant the United Fruit Company recover of the said plaintiffs its costs of suit; and it is further considered by the court, pursuant to the alternative verdict ordered to be entered on September 6, 1923, that the said H. Anton Bock and Donald Page, administrators, plaintiffs, take nothing by their said writ and that the defendant [fol. 14] the Northern Railway Company of Costa Rica recover of the said plaintiffs its costs of suit taxed at $—

IN UNITED STATES DISTRICT COURT

Substitute Bill of Exceptions—Filed and Allowed March 12, 1921

STATEMENT

This is an action of contract or tort to recover damages for personal injuries sustained by the plaintiff while a passenger on the defendant railroad in the Republic of Costa Rica, as the result of an attack with fire arms by the Government military troops.

The writ is dated January 5, 1921.

The pleadings and specifications are referred to and made a part of this bill of exceptions.

The jury made certain special findings, to wit, that the plaintiff was injured by the negligence of the defendant, and that the plaintiff's damages amounted to thirty-five thousand (35,000) dollars from which they deducted ten thousand (10,000) dollars with the consent of the plaintiff, being a sum received from the Costa Rican Government under circumstances hereinafter set forth, a copy of which finding is annexed hereto and marked "Exhibit G."

It was not disputed that the evidence of damages was sufficient to warrant a verdict for the amount assessed by the jury.

The defendant railway filed a motion to set aside the verdict as not warranted in law, and that the alternative verdict of the jury for the defendant be entered, which the court granted.

A copy of the motion is set forth on page 88 of this bill of exceptions, and a copy of the memorandum of the court's opinion thereon is annexed hereto and marked "Exhibit F."

Evidence was offered from which the jury could find the following facts:

The plaintiff at the time of the accident was a citizen of the United States and a resident of Connecticut; was fifty-four years of age, and a mechanical engineer by profession. Up to the time of this visit to Costa Rica, the plaintiff had been actively engaged in his pro- [fol. 15] fession, which he temporarily suspended while on this mission, with the intention of resuming it upon his return to the United States.

The accident occurred on February 23, 1918. The plaintiff was then engaged in Costa Rica in an undertaking to provide for a colony of Belgian war refugees, then in England, and had been conferring with President Tinoco of Costa Rica, at San Jose, respecting the plans for such colony. The plaintiff testified that the President was a friend of his. After the interviews with the President, the last of which occurred on February 22d, the day before the accident, the plaintiff arranged to return to this country by the way of the defendant's railway to Port Limon, and thence by steamer of the United Fruit Company to the United States. There was some political disturbance in San Jose on that day, due to a local and recent insurrection occurring west of San Jose. This was the first revolution in Costa Rica in a great many years.

The plaintiff testified on direct examination as follows:

"Q. 1. With whom did you have any talk with reference to the conditions of the road?

A. Well, we talked at the steamship office, but I went up to the palace and saw the President, and he said——"

The defendant objected to any further answer. The court allowed the following question and answer, subject to defendant's exception:

"Q. 2. You may state, Mr. Ryan, what was said to you by Tinoco as to the conditions of safety or danger on the road?

A. Why, the President said that it was perfectly safe to travel; that the insurrection didn't amount to anything, and that it was all on the other side, the Pacific side; that it didn't amount to anything."

The plaintiff was asked what the man at the ticket office said to him about the safety of the railroad at the time he bought his ticket. The defendant objected and duly excepted, and the plaintiff was allowed to testify that "He said it was all right, it was all safe; he just laughed about it."

On the following morning, February 23d, 1918, the plaintiff left San Jose on the 8 a. m. regular daily passenger train for Port [fol. 16] Limon, due at 4.30 p. m. The train was composed of an engine, five freight cars, a combination baggage and second-class passenger car, one or two first-class coaches and a pay car, in the order named. The pay car was a coach. It contained gold and silver currency and express parcels. The conductor in charge of

the train was one Ramsay and he and other members of the train crew were the regular employees of the defendant railway company. The passengers consisted of the usual persons, natives (non-combatants), and some foreigners, including the plaintiff and some other citizens of the United States. Some of these passengers, including the plaintiff, were going to take the steamer from Limon to New York, due to sail the following morning. There were men, women and children, colored and white.

The train arrived at a station called Turrialba, about sixty-five miles from Port Limon its destination, at about 11.30 a. m. without the occurrence of any previous unusual incident. It was there boarded by a band of insurrectos who took possession of the train and searched it for persons official- connected with the Costa Rican Government. One prisoner was taken, on suspicion that he was a sympathizer with the Government. The other passengers were unmolested, and were assured by the officers in command of the insurrectos that they would not be harmed,—that they would merely be detained while the insurrectos used the engine to go up the track to destroy the rails between that point and San Jose. The plaintiff was asked what the revolutionary general, Guardia, said to the passengers. The defendant objected and duly excepted to the admission of the answer, which was in substance that General Guardia said he expected to be attacked any minute; the plaintiff himself said we should get the women and children and non-combatants out of the train; Guardia said we could go where we wished, but could not go on the train. A gang of the insurrectos then took the engine and were gone in the direction of San Jose for about two and a half hours, leaving the passengers and the balance of the train at the station at Turrialba.

The passengers pleaded with the commander of the insurrectos [fol. 17] to release the train, but were refused unless the railway company would furnish the insurrectos with another engine. Finally late in the afternoon the train was allowed to proceed.

As the train was starting from Turrialba a revolutionary officer ordered several of his men to go on the train to blow up a bridge at Torito and the insurrectos jumped aboard. Some were armed with guns and other weapons, and others with picks and shovels. At Torito, about two miles from Turrialba, all the rebels left the train to tear up a bridge, and the train proceeded to Peralta, a distance of about six or seven miles from Turrialba.

A map, drawn to scale, showing the distances between the various points on the railroad and other physical conditions was offered in evidence and marked "Exhibit XX," and is made a part of this bill of exceptions.

At about 3.30 p. m. on the day of the accident a train was dispatched from Port Limon over the defendant's railroad, carrying Government military troops. The troops were ordered to Turrialba to meet the rebels. The train was in charge of a conductor and train crew who were the regular employees of the defendant company. The regular daily westbound train from Port Limon to San

Jose was not run beyond Peralta on the day of the accident. It was recalled to Limon from that point at about 12.30.

Referring to the westbound train RAMSAY testified:

"Q. 1. Well, did it back back, or did you pass it on the way down?
A. Didn't pass it; no, sir. It turned from Peralta.
Q. 2. And went back?
A. Went back; yes sir.
Q. 3. And was there any other train going either way on that line except the day train, day passenger train?
A. At that time those were the only two scheduled trains that were running between Limon and Cartago."

[Cartago is west of Turrialba.]

Q. 4. And you say (when you got to La Pascua) there was no other train on the road at that time as far as you know going east or west but yours?
A. Except the troop train and the one that I was on."

The troop train arrived at Siquirres, a distance of about 38 miles [fol. 18] from Limon, at about 5 p. m., and left at about 5.30 p. m., and ran to Las Lomas, a distance of about five or six miles, where orders were received to pass an "extra" or "special" train at La Pascua, a distance of about six miles away.

At Peralta conductor Ramsay received a message from the defendant's officials at Limon to pass a special train at La Pascua, a distance of five or six miles from Peralta. No information was given to Ramsay that the special train was carrying troops.

The troop train arrived at La Pascua a few minutes after the arrival of the passenger train at that place.

Respecting the time of arrival of the troop train at La Pascua, the plaintiff testified on direct examination as follows:

"Q. 3. That was about what hour, if you know?
A. That must have been about six or seven o'clock."

MARSH, superintendent of defendant railway, stationed at Limon, testified on cross-examination:

X Q. 1. Do you know what time it (the troop train) arrived at Pascua—that is, of your own knowledge?
A. About seven o'clock.
X Q. 2. That you received from other people, did you not,—that information?
A. Well, I was advised by the dispatcher.
X Q. 3. You received that information from others?
A. Yes, sir."

GRANT, a witness for the plaintiff, testified on direct examination as follows:

"When the cars came close enough you could see guns sticking out of the window in perfect alignment, and see troops standing on the steps, so that I believe somebody on the ground, Mr. Ram-

say or Mr. Veitch or somebody else there, mentioned that it was a troop train going up to attack these revolutionists."

When the locomotive of the troop train arrived opposite the combination baggage and passenger car, Ramsay flagged it and told the engineer to look out for the Torito bridge where he had left revolutionists, that he would probably find it torn up. Two officers then alighted from the troop train and one said to Ramsay "What train is this?" to which he replied that it was the regular [fol. 19] passenger train from San Jose to Limon. He told the officer in English and then in Spanish that there were no revolutionists on board. Ramsay testified that he knew the officer by sight as he had traveled on his train before. At the same time the other officer was speaking to one Veitch, who testified at the trial for the defendant. He asked Veitch what the train was, and Veitch replied that it was the passenger train from San Jose to Limon, and that there were no revolutionists on board. Veitch had been an importer and banana grower in Costa Rico for eleven years prior to 1918, and was then consular agent for the Italian Government. Ramsay then signaled his train to proceed, the officers demanded that it be halted, which was done. The troop train then began to move forward, the officers walking beside it. When the passenger cars of the troop train were approximately opposite the passenger coaches of the passenger train, and while the troop train was still in motion, although coming to a stop, one of the officers raised his sword and waived it and an order to fire was given. Immediately the firing began by the troops, some kneeling in the car with their guns extending out of the windows about three feet, and some on the platforms.

Mr. Veitch testified on direct examination:

"Q. 1. And did you hear any signal or order given by anybody?

A. I saw one of the officers, the man I had been speaking to, raise his sword in the air and shout something. A military order is always difficult to understand. I didn't hear the exact word he gave.

Q. 2. Did the firing begin immediately?

A. Immediately. He was evidently understood on the troop train." * * *

"Q. 3. What did you do?

A. I stood there until I saw them pointing their guns at me and then I dived under the train.

Q. 4. And did you get hit or any part of your clothing?

A. Yes, they put a bullet across the seat of my trousers and split it open; put another bullet through my clothes here, and two bullets through my valise and one through a bag I had in my hand." "I saw a man named Betty killed." * * * "He was in the front of our coach." * * * "I saw a man shove the gun about as close as [fol. 20] I am to this gentleman here—the muzzle of the gun was about two feet from him. He was leaning out of the window like, or leaning over here."

GRANT testified on direct examination:

"A. * * * Mr. Ramsay said, 'I tell you there are no revolutionists.'

Q. 1. Was it in effect, 'I tell you, man, there are no revolutionists on this train'?

A. That is my understanding of it."

GRANT testified on cross-examination:

X Q. 2. Now, you heard Mr. Ramsay say to one of the officers, 'This is a passenger train, the regular passenger train, and has no troops on board—no rebels or revolutionists on board'?

A. Yes, sir.

X Q. 3. Was that in Spanish or in English?

A. Spanish.

X Q. 4. Did you hear Mr. Veitch, also in Spanish, say substantially the same thing to the other officer?

A. Yes. I couldn't quote his words. He did." * * *

"It was one of the officers who started that firing just after being told that it was the passenger train." * * *

"X Q. 5. Any indication of liquor on any of these troops?

A. No, sir.

X Q. 6. Didn't see anything of that sort?

A. I didn't see anything of it, and the train crew reported that they made an investigation and didn't find any liquor in the train at all."

On redirect examination Grant testified:

"Q. 7. Will you state, Mr. Grant, what you did observe, as to the ability of the soldiers to see into the train before the firing?

A. At each window of the troop train there were two soldiers who apparently were kneeling, that is to say, with ordinary Mauser rifles they were projecting possibly a half out of the window. That means they were at least three feet back from the window sill. The rigidity with which those things were held and the perfect alignment of all those guns from one end of the train to the other showed positively that they had their attention fixed along the line that these guns were pointing. Therefore the angle of visibility that any individual [fol. 21] soldier in those positions would have would be limited to just about one car window, which happened to be just in front of him, and at the time this shooting started that troop train was still in motion, so that the windows of our train must have been apparently moving opposite, and a soldier couldn't see into one window more than a second before that window would have passed out of the range of vision and he would have been looking into another one. The result is, if any individual soldier happened to see any individual person that he was shooting at, he could hardly have looked at them more than a second or two, or otherwise they would have passed out of his range of vision, that is, until those trains stopped; but by the time the train stopped the firing had become general."

The plaintiff testified on direct examination:

"I could see Mr. Ramsay down near the engines, talking with the commander, some man in a suit, and a fellow with a sword, and then the trains pulled up and moved just a little ways." * * *

"It was sort of dark in the car, anyway, and I didn't have any sight left hardly." * * *

"Q. 4. What was it, twilight at that time, or dark or light?

A. Just dusk, just coming dusk, and darkness comes on pretty quick there."

The plaintiff testified on cross-examination:

X Q. 5. It wasn't dark enough at that time to have had the lights lighted in the train, was it?

A. They were just lighting them then.

X Q. 6. It was light enough so that you could see quite a considerable distance?

A. Oh, yes.

X Q. 7. You could see when the train did come, you saw that it stopped?

A. Yes.

X Q. 8. Up with its engine about opposite yours?

A. Yes.

X Q. 9. And that Mr. Ramsay was forward, apparently talking to the general in charge of the troop train?

A. Yes.

X Q. 10. How far ahead of you, where you were sitting, was that?

A. Oh, I don't know. That would be probably 100, 150, may be 200 feet. I don't remember. It was the full length of the train. We were pretty nearly back.

[fol. 22] X Q. 11. And it was light enough so that you could distinguish Ramsay and the generals?

A. Oh, yes.

X Q. 12. That distance away?

A. Yes." * * *

"X Q. 13. So these troops, looking right into your car, could see these women and children in the car?

A. If they looked in there I should say so.

X Q. 14. I mean, they were plainly visible?

A. Yes." * * *

"X Q. 15. You noticed nothing about the appearance of these troops?

A. No, no. I didn't notice the troops very much, anyway. It was a little too dark in their car to see what was in there, but I saw men in there and saw their guns sticking out. I was more interested in the guns than I was in the men." * * *

X Q. 16. You have no doubt that the troops could see just what they were firing at?

A. Oh, surely; I should say so."

GRANT testified on cross-examination:

X Q. 8. How far were you at that time from the general, or whoever it was,—the uniformed man whom you heard call out the Spanish word for fire?

A. Oh, about one and one-half car lengths.

X Q. 9. No difficulty about your seeing him?

A. No, sir.

X Q. 10. Or his seeing you?

A. No, sir.

X Q. 11. And whoever fired at you could see you plainly enough in that light, couldn't he?

A. Yes, sir." * * *

"X Q. 12. Regular Government troops, and did you see the troops inside the cars behind their guns?

A. I saw them when the train got directly opposite me, because the ends of their guns passed about a foot over my head. It was easy enough to look in there.

X Q. 13. I think you said some of them were standing behind the others?

A. Yes, sir.

X Q. 14. You could see them?

A. Yes.

X Q. 15. You didn't have any difficulty about that? You didn't have any difficulty in seeing them in there?

A. Oh, no, no." * * *

"X Q. 16. 'Although it was dusk at the time, yet there was good visibility up to 200 feet. When we had pulled clear of the switch we saw two wounded lying on the side of the track some distance [fol. 23] back.' Do you remember that?

A. I was back there with them; yes, sir.

X Q. 17. Well, it is a fact that there was good visibility up to 200 feet, isn't it?

A. Up to 200; yes sir. You see, in those countries there is almost no twilight, and a difference of five minutes makes a terrible difference in the amount of visibility.

X Q. 18. But at this time you could see at least 200 feet?

A. Yes."

GRANT testified on redirect examination:

"Q. 19. You said something about there being a short time between twilight and dark. Had the sun set at the time of this accident?

A. Yes, sir. The sun was just about setting when that troop train first came in contact with us.

Q. 20. And how soon does darkness, total darkness, fall after the setting of the sun?

A. In those latitudes it would be totally dark in twenty-five minutes, thirty minutes."

RAMSAY testified on direct examination:

"Q. 5. Was it light?
A. Yes, sir."

VEITCH testified on direct examination:

"Q. 5. Was it light enough to see this passenger train?
A. Oh, quite.
Q. 6. Women and children in the windows?
A. Yes."

MARSH testified on cross-examination:

"X Q. 5. I am referring to the time of year when the accident occurred, in February.
A. It doesn't get dusk then until later.
X Q. 6. At about what time should you say?
A. Oh, around seven o'clock it is twilight; I would say at seven-thirty it would be dark."

The plaintiff further testified that firing began opposite the combination car, which was at the rear, rushed to the windows when the firing began.

On recross-examination he testified as follows:

"X Q. 17. The firing was practically instantaneous, wasn't it? That is, you don't feel very positive that it began at one car before it did at the others, do you?
A. Well, it seemed as though, Mr. Dodge, it started over like in that corner there and came along.
[fol. 24] X-Q. 18. Well, you said it seemed as though it did, and I judged that perhaps you didn't feel absolutely confident that it wasn't an instantaneous volley along the line.
A. I didn't, of course—that would be nearly impossible with Spanish troops anyway, to get it all at once.
X Q. 19. Well, let us not reason it out.
A. That is it.
X Q. 20. This is something that you didn't testify, as I remember, at the last trial. I don't think you testified at the last trial that the shooting began somewhere else and worked along the line.
A. Well, I wasn't asked it in that way.
X Q. 21. Probably not?
A. No.
X Q. 22. And you think now that perhaps it began——
A. I tell you, Mr. Dodge, why I think——
X Q. 23. No; no matter, Mr. Ryan. You think that it began in the car in front.
A. Yes, I think so, because I had time to drop before they got into our car.
X Q. 24. The entire shooting was over in a few seconds, wasn't it?
A. Oh, a minute or so.
X Q. 25. Now, a minute is a pretty long time?

A. It is a long time, but they fired about 500 shots in there.
X Q. 26. You think they did?
A. And if that was instantaneous I wouldn't be here testifying, I I am pretty sure of that.
X Q. 27. At the time you were struck you had stooped down?
A. Yes.
X Q. 28. Where were the other passengers? You say they went to the window when they first heard——
A. Why, it seemed as though there was a surge there, but I was dropping at the time. It would only be a momentary glance.
X Q. 29. You didn't really see what the other passengers were doing?
A. No, I didn't, and my testimony wouldn't amount to anything on that."

There was evidence that the firing was into the windows of the cars.

Ramsay testified on direct examination that when the order to fire was given "the troop train was just about stopped, probably it was moving slowly."

[fol. 25] GRANT testified on direct examination:

"Q. 21. Was the first shooting that you heard a volley, apparently, of the entire troops?
A. No, sir; my impression is that about four shots were fired from two or three seconds before the main volley was fired."

GRANT testified on cross-examination:

"X Q. 22. The train was almost stopped, certainly when the shooting began, because there is no question it was standing still when the bulk of the shooting was done, is there?
A. Yes, sir, but the brakes were applied fully all at once.
X Q. 23. Stopped quickly?
A. Yes, sir.
X Q. 24. And the trains were standing still during the greater part of the shooting?
A. Yes, sir.
X Q. 25. Which only lasted about sixty seconds, I think you said?
A. Approximately that."

Ramsay testified that when the firing began he "hollered several times at the troops that they were firing at passengers, that there were no revolutionists on board."

The plaintiff testified on direct examination:

"Q. 31. Now, when you were at Turrialba did Ramsay, the conductor, remain in the presence of the passengers?
A. Oh, yes.
Q. 32. All the time?
A. Oh, yes. He was sitting on the bench at the station a good deal of the time." * * *

"The Court: Well, what he said, yes. Go on and tell us what the conductor said.

The Witness: What he said.

The Court: Yes.

The Witness: There was a little revolutionist about twelve years old or so, and Mr. Ramsay shouted 'Vive la Revolution' for the boy, and everybody laughed about it." * * *

"Q. 33. Now, when you arrived at Torito did Ramsay say anything about the situation?

A. Why, when we left he says, 'Well, thank the Lord we are rid of that crowd,' or something of that sort."

On cross-examination the plaintiff testified regarding events on February 23, 1918, as follows:

[fol. 26] "X Q. 34. You left San Jose at eight o'clock?

A. About eight o'clock.

X Q. 35. And expected, of course, no trouble in going down?

A. Yes.

X Q. 36. You have no doubt that Mr. Ramsay, the conductor, and all the railroad people anticipated no trouble at all?

A. They didn't seem to.

X Q. 37. Everybody thought that such little insurrection as there was was over on the other side of the capital city?

A. Yes, sir.

X Q. 38. As a matter of fact, this insurrection lasted only five days, didn't it, this revolution?

A. I don't know. They told me before I left the hospital that it was all over.

X Q. 39. That is, within a week after your accident?

A. Yes, sir.

X Q. 40. So that this thing that occurred down here where you were injured was a thing that of course was not anticipated by anybody?

A. No, I should say not." * * *

"X Q. 41. Yes, so that the running time from Turrialba down to Limon was about four hours?

A. Yes." * * *

"X Q. 42. Now, Mr. Ryan, everything went all right on this trip down until you got to Turrialba?

A. Yes.

X Q. 43. And you have no reason to believe that anybody knew before you got to Turrialba that there were revolutionists there?

A. No.

X Q. 44. Your train was seized by, I think you said, a hundred armed men?

A. I should say about that. Of course, I couldn't——

X Q. 45. Under the lead of two men who called themselves generals?

A. Yes, sir.

X Q. 46. Guardia and Gomez?

A. Guardia and Gomez.

X Q. 47. They were armed with guns?

A. I don't know whether they called themselves generals, but we called them that.

X Q. 48. And they were armed with guns and everything?

A. All sorts of artillery; yes.

X Q. 49. They took possession of the train, I think you said [fol. 27] that some of them walked through the train?

A. Some of them what?

X Q. 50. Walked through the train?

A. Oh, yes; yes, several times.

X Q. 51. Those in control assured the passengers that they did not mean any harm to them, didn't they?

A. Yes.

X Q. 52. And that you were free to go anywhere you wanted to, but that they wanted the engine?

A. That is it.

X Q. 53. And they took the engine?

A. Yes." * * *

X Q. 54. You don't know what the rebels would have done with any other locomotive that might come into their control there?

A. No; I don't know anything about that.

X Q. 55. Now, you were at Turrialba from about 11.30 to about half past five?

A. I should say about half past five.

X Q. 56. Mr. Ramsay and all of you, of course, wanted to get away?

A. Yes, naturally.

X Q. 57. I suppose you had or there was on the train some valuable freight and baggage on its way down to the steamboat?

A. Yes. I understand the pay car was on the back.

X Q. 58. The pay car on the back?

A. Yes.

X Q. 59. So that there was no reason why the railroad would not be just as anxious as were the passengers to get that train down, was there?

A. That is so.

X Q. 60. That is true. And Mr. Ramsay soon after arriving at Turrialba telephoned down to Limon to the general offices of the railroad about the situation?

A. I don't know about that.

X Q. 61. You don't know about that?

A. No.

X Q. 62. There was a telephone there?

A. At Turrialba?

X Q. 63. Yes.

A. Oh, yes.

X Q. 64. And these revolutionists, some of them, went back on the engine, and some of them stayed around there, didn't they?

A. Mariana Guardia was there all the time. He stayed on the platform or about there.

X Q. 65. Guardia was there?

A. Yes.

X Q. 66. Did you know him personally?

A. Yes, I knew him a little before.

[fol. 28] X Q. 67. Did you know Gomez also?

A. No, no; I never knew Gomez before that.

X Q. 68. But you knew Guardia and talked with him while you were there, didn't you?

A. Yes; quite a little.

X Q. 69. And you anticipated no injury to yourself or any to the other passengers?

A. No.

X Q. 70. Guardia was friendly with you, wasn't he?

A. Oh, yes; very.

X Q. 71. And you talked with Mr. Ramsay?

A. Oh, yes.

X Q. 72. Mr. Ramsay had been a conductor for a great many years on this road?

A. Yes, and is well liked by everybody.

X Q. 73. Very well liked and very well known in Costa Rica?

A. Yes.

X Q. 74. And these rebel generals, if they were generals, they knew them?

A. They knew Ramsay.

X Q. 75. Yes.

A. Oh, yes, indeed, they did.

X Q. 76. So that the only difficulty there at Turrialba was the annoyance of being delayed and the desire to get down to the coast?

A. That is true.

X Q. 77. And you were all working for that common end?

A. That is it.

X Q. 78. Now, I think that you said that at some time while you were there a message was got up and signed to the United States Consul down at Limon?

A. Yes.

X Q. 79. That wasn't the first message that was sent down, was it?

A. I didn't know of but one.

X Q. 80. You knew of that one?

A. Yes.

X Q. 81. Well, that is the one that you and Mr. Grant and some of the other passengers signed?

A. Mr. Young and Mrs. Young—all the American passengers signed it.

X Q. 82. Now, you got away, didn't you, about two hours and a half after that was sent down?

A. Why, yes. I don't know just when we did send that down.

X Q. 83. I think Mr. Grant testified at the last trial that it was about two hours and a half after you sent it.

A. Well, he would know more about it than I would.

[fol. 29] X Q. 84. The object of telephoning down and trying to get word to the consul was so that an engine might be sent up from Limon and you might get away?

A. That was one part of it, but that wasn't what we talked.

X Q. 85. Let me see. No, I don't care what you talked. I am interested in what was sent down.

A. Well, what was sent down, I don't remember that message at all.

X Q. 86. Let me look at the testimony. Who wrote that message?

A. I think Mr. Grant wrote it.

X Q. 87. Well, the object in sending it down was so that you could get away from Turrialba, wasn't it?

A. Partially so, and the object was to get safely through.

X Q. 88. Get safely through?

A. Yes.

X Q. 89. Well, now, the telegram or the message was in substance that there were a lot of American citizens up there in the hands of the rebels and couldn't the American Consul give some word or do something in some way to get us out, assist us in getting out of that trouble; that is the substance of that message?

A. That was about it; yes.

X Q. 90. That is as you testified before?

A. We were afraid they were going to fight there—people right there.

X Q. 91. No matter about that, Mr. Ryan, if you will pardon me. All I am concerned with is what that message was.

A. Yes.

X Q. 92. Now, you did get away about two hours and a half after that message was sent?

A. Yes.

X Q. 93. Mr. Ramsay, after he had taken that message, reported to you that this was nothing but the company's telephone line, not connected with the consul or anybody else, didn't he?

A. Yes. He said it was only for company business. I don't believe he explained why. * * *"

"X Q. 94. You have no question but that down at Limon in the railroad offices they knew that your train was held up?

A. I should say they would.

X Q. 95. Substantially as soon as it was held up?

A. Yes. * * *"

X Q. 96. As it turned out you incurred danger because of some-[fol. 30] thing that was entirely unforeseen and unfor-see*n*able by you or Ramsay or anybody else?

A. Yes.

Mr. Perkins: Just a minute.

[The question is read.]

X Q. 97. So far as you know?

Mr. Perkins: Unforesee*n*able by anybody else?

The Court: So far as he knows.

Mr. Dodge: So far as he knows. I should have added that.

The Court: But whether he knows about it—yes, that may be answered.

X Q. 98. That is true, so far as you know, nothing that happened there at La Pascua could have been foreseen by anybody?

Mr. Perkins: Well, I——

A. I don't know about that.
X Q. 99. Well, now, I am going to ask you about it.
A. That it couldn't have been foreseen?
X Q. 100. Yes. Did you foresee it?
A. Well, I had a faint suspicion.
X Q. 101. Pardon me, Mr. Ryan. Did you foresee, when you arrived at La Pascua and saw that troop train passing, that they were going to fire into this passenger train?
A. No, I did not, but as soon as——
X Q. 102. That is all. You have answered the question.

The Court: You may go on, Mr. Witness, and finish your answer.

A. (continued). I foresaw this—that there was a dead line somewhere, and there was a troop train and here was a rebel train, as far as they knew, and there was a dead line somewhere——
X Q. 103. Well, now——

Mr. Perkins: Had you finished ?
The Witness: No.

A. (continued)—and the consul could get us through that dead line, and he would have to do it through Tinoco, because it isn't likely that Mariana Guardia—the man on that troop train—would take any commands from Mr. Ramsay or anybody else, Chittenden [fol. 31] or anyone else. He would have to have his orders from San Jose, and somewhere between those two trains was a dead line. The consul could have got us through that.

Mr. Dodge: I ask that he struck out as not responsive.
The Court: No. I think it is quite all right. Yes.
Mr. Dodge: I ask to have your Honor save my exception.

X Q. 104. Now, let me ask you this: At Turrialba, when your train was finally released and started down, you noticed that some of the rebels jumped on your train?
A. Yes.
X Q. 105. Saying that they were going down to destroy the Torito bridge?
A. Well, they didn't, but Mariana Guardia said they were going down to.
X Q. 106. He was one of them, wasn't he?
A. Yes; he was the head man.
X Q. 107. And they went down on your train, some of them, I think you said, armed men on top of one of the freight cars?
A. I thought they were on top of the freight car, there.
X Q. 108. And they all got off at Torito?
A. I couldn't see whether the fellows on top of the car got off or not. I saw the men on the platform did.

X Q. 109. It is your understanding, as you testified, that they all got off at Torito?

A. Yes.

X Q. 110. They didn't get on your train at Turrialba until the last minute, did they?

A. These men?

X Q. 111. Yes.

A. The men with the picks and shovels and fellows with guns were sitting up on there, and the fellows with whatever arms they had were up on top of the freight car quite a little.

X Q. 112. Before you started?

A. Yes.

X Q. 113. And it was the men with the tools that jumped on at the last minute?

A. Yes.

X Q. 114. They all left the train at Torito and thereafter you were merely an ordinary passenger train going down?

A. I should say so.

X Q. 115. You didn't have any rebels on board then?

A. I didn't know of any.

[fol. 32] X Q. 116. And you understand that there weren't any?

A. I didn't understand there were any

X Q. 117. And you got down to Peralta, and I think you said that the train stopped there?

A. At Peralta; yes.

X Q. 118. And then you stopped again at La Pascua?

A. Yes. I don't remember the stops very well. It is all in the matter of course.

X Q. 119. And you were still this mixed train of two or three freight cars and the combination car and the baggage car?

A. For all I know the train was just as it started.

X Q. 120. When you got at La Pascua your train took the siding to the right?

A. Yes, to the right.

X Q. 121. And stopped?

A. And stopped; yes.

X Q. 122. And you were there some minutes before the other train came up, weren't you?

A. Yes. They were not there when we got there, I don't think.

X Q. 123. Did you understand you were going to pass a train there (La Pascua)?

A. No. I didn't know anything about it.

X Q. 124. You hadn't heard about that?

A. No; I didn't hear anything about it." * * *

"X Q. 125. Were you still sitting in the passenger coach?

A. I still sat in the car; yes.

X Q. 126. Some of the other passengers had got out, had they not, and were walking around?

A. Yes, they did get out and were walking around.

X Q. 127. You don't know, of course, what Mr. Ramsay said to the general in charge of the troops?

A. No, I don't.

X Q. 128. And you didn't hear what other conversation there may have been with the troops?

A. No, I didn't hear that.

X Q. 129. Then this train containing the troops pulled up so that it was right beside your train?

A. The troops were?

X Q. 130. Yes.

A. Yes.

X Q. 131. Right opposite your car?

A. Yes. The first of them were nearly opposite our car.

X Q. 132. This was after they had stopped first with the engines opposite; then they came up and stopped so that the two cars were [fol. 33] opposite each other?

A. Yes. They apparently were going on, and then all at once it was stopped.

X Q. 133. Now, at that time your train contained women and children, didn't it, your car?

A. Yes, yes.

X Q. 134. And there was nothing about it different in appearance in any way from any passenger train?

A. I should say not.

X Q. 135. No sign of armed men about?

A. No, I should say not.

X Q. 136. There weren't any armed men in the car?

A. I don't think so.

X Q. 137. And these troops were how far away from the car in which they fired?

A. Well, it was just the width of the track there. Perhaps you mean the distance between the cars.

X Q. 138. Yes; six or eight feet.

A. The distance between the cars?

X Q. 139. Yes.

A. Oh, I should say about six or eight feet, may be." * * *

"The Court: That is quite all right, Mr. Dodge. Go ahead.

X Q. 140. In fact, the windows of your car were all open, weren't they?

A. Nearly all, if I remember right.

X Q. 141. Warm weather, even in February?

A. Oh, yes. It was warm there.

X Q. 142. So that these troops lined up in this car opposite fired this volley right into the women and children in your car?

A. Yes; fired right in the windows.

X Q. 143. There hadn't been any sign of hostility on the part of those troops to anybody in your car, had there?

A. Not at all.

X Q. 144. Nothing about it to indicate that it was anything other than what it was, namely, an ordinary passenger train?

A. That is true." * * *

"X Q. 145. There were a good many women and children in your car, weren't there?

A. I don't know.

X Q. 146. How many passengers do you suppose there were in all in that car?

[fol. 34] A. Oh, I don't suppose that I would be able to say that now. It seems as if there would be 20 or 25 people; maybe 20—nearer 20.

X Q. 147. And it was a car like an American car, that was open right through?

A. Yes; one aisle right through.

X Q. 148. And the windows were up, and some of these passengers leaning out, weren't they, or looking out?

A. I don't know about leaning out. Some of the passengers were standing up.

X Q. 149. Looking out the windows?

A. Well, I couldn't say as to that, but I should say so. They were about the aisles, but I didn't notice that particularly.

X Q. 150. About how long should you say your train had been at La Pascua before this troop train arrived?

A. Oh, I should say may be five or ten minutes.

X Q. 151. And how long should you say you saw Mr. Ramsay and this general talking up forward about it?

A. Why, I just looked out and saw them there and paid very little more attention to it. It didn't mean anything to me.

X Q. 152. Saw them standing there for some time?

A. They may have been, but I didn't notice it. I didn't follow that.

X Q. 153. There was no indication that anybody was alarmed in any way or expected any trouble?

A. I don't know anything about that.

X Q. 154. No one showed any sign of alarm, certainly?

A. I didn't see any.

X Q. 155. And you saw nothing done by anybody on your train which could have caused the troops to think there was anything hostile to them?

A. No." * * *

"X Q. 156. Oh, there was one point. I think you testified before that you took part yourself in several of the efforts that were made to get away from Turrialba, to get the rebels to allow you to start down.

A. What's that, Mr. Dodge?

X Q. 157. You took an active part in the effort to get the rebels to let you go from Turrialba?

A. Oh, yes.

X Q. 158. And you finally succeeded?

A. Why, I think so; I don't know as I succeeded.

[fol. 35] X Q. 159. That is, you continued your efforts?

A. We went away; that's all I know.

X Q. 160. Well, you know a little more than that, don't you? You know that you had some letters about it,—I think you told us

at the other trial,—some letters which you showed to the rebel chiefs to make them think that they were Government dispatches or something of that sort?

A. That is it; yes.

X Q. 161. And you and the passengers and all of you were in constant conversation with the rebels there?

A. Yes; generally so."

GRANT testified on cross-examination:

"X Q. 26. There were women and children passengers in that car where Mr. Ryan was and where you were?

A. Yes, sir.

X Q. 27. Windows open?

A. Largely so.

X Q. 28. Those fellows that fired into the car fired right at women and children that they could plainly see, didn't they?

A. There may have been one or two that could plainly see them, but the bulk of the soldiers couldn't see anything over a square equal to one window because they were sighting right along their guns, and they were sighting at the time that they came in sight of this train.

X Q. 29. And when they got opposite this car and fired their guns, they were looking right out of the windows of their car?

A. Yes, sir.

X Q. 30. And this train was about six or eight feet away?

A. Yes, sir." * * *

"X Q. 31. And women and children looking out of the windows?

A. Yes, sir.

X Q. 32. And you were standing on the ground between the tracks?

A. Yes, sir.

X Q. 33. You didn't have anything, any weapon, or anything that looked like a weapon?

A. No, sir.

X Q. 34. Aimed a gun right at you, didn't he?

A. Some men on the steps of the platform did; yes, sir." * * *

"X Q. 35. Shot off (your) garter?

A. Yes, sir." * * *

[fol. 36] "X Q. 36. And whoever fired at you could see you plainly enough in that light?

A. Yes, sir."

The witness further testified on cross-examination, that down to the time that the officer waived his sword and some one called "Fuego" there was nothing whatever in the appearance of the passenger train or the passengers to indicate there were revolutionists there. It was just an ordinary passenger train with no show of a gun or of hostility. The troops on the troop train were regular Government troops, not revolutionists. It was easy enough to look into the troop train and see some of the men standing behind the others. At the moment the firing started there were some people sticking their heads out of the windows of the passenger train.

"I have a recollection of one woman who was later shot having her head out of the window. I don't remember at this moment any children, but I presume there were at the time."

The witness further testified on cross-examination, that after the accident he confirmed Mr. Veitch's statement that there were men, women and children leaning out of the windows of the passenger train and that that was probably accurate. He also testified that thirteen or fourteen passengers were injured, of whom four were killed.

"X Q. 37. How many women were injured or killed?

A. There was one woman killed, and inasmuch as she would shortly have been a mother, two there. One woman had her leg shot off, and shot through the breast, and another woman was shot through the head, and there was one Jamaican negro shot through the heart.

X Q. 38. That was a man?

A. Yes, and then there was a Panamanian shot in the hip, coming out in the groin. The bullet took his arm off. He died the next day."

The plaintiff was struck by an explosive bullet, destroying the sight of his better eye and lodging particles of the shell in the head and other parts of the body, resulting in a physical condition which incapacitated him from the practice of his profession.

The railroad was a single track line between Port Limon and [fol. 37] Turrialba, with sidings at La Pascua and other points. The country through which it ran in the vicinity of La Pascua was mountainous and about half a mile from La Pascua on either side the road was built upon the hillside above a river about twenty feet below. There was a train dispatcher's telephone line from the head office of the defendant railway to Limon, to Turrialba and beyond, having telephone connections with various stations on the road, including Siquirres, La Junta, Las Lomas, La Pasqua, Peralta and Turrialba, and with operators at Siquirres, Las Lomas, Peralta and Turrialba, but only telephone booths at La Junta and La Pasqua. This line was the Railway Company's line and did not connect with any outside exchange.

There was a railroad telegraph line from Limon to these same stations on the road available for use whenever required. The telephone service was always used for the operation of the trains when the line was in order. On the day of the accident the line was in order east of Turrialba, but had been cut by the revolutionists west of Turrialba.

There was also a separate telephone line owned by the United Fruit Company from Limon to Siquirres, and the defendant railway had the privilege of using it whenever it was needed. There was also a Government telegraph line from Limon to Siquirres and Turrialba.

The general manager of the defendant Railway, CHITTENDEN, a witness for the defendant, testified on direct examination respect-

ing the method of operation of the road after the capture of the train at Turrialba:

"Q. 1. How did you first receive the information of the capture of that train?

A. I was informed by the superintendent of the railway, who had received his information over his dispatcher's wire from the conductor of the train.

Q. 2. Upon receipt of that information, what did you do?

A. I notified the Governor of Limon, also the Minister of War in San Jose. That was the first thing I did." * * *

"Q. 3. What conversation had you with the Governor of Limon regarding the movement of trains after you received word that [fol. 38] this passenger train had been captured by the revolutionists?

A. I informed the Governor that we would have to demand protection before we were willing to run any trains. I informed him then that we would run no trains unless on his instructions.

Q. 4. Was that conversation you had in person with the Governor?

A. Yes, sir.

Q. 5. And what did the Governor say?

A. The Governor informed me that he would instruct me when and how to proceed with the operation of train service until further notice.

Q. 6. And after that did he give you instructions as to train movements?

A. For some two or three days after the train was seized at Turrialba.

Q. 7. Did that apply to all train movements over the Northern Railway of Costa Rica in the section between Limon and San Jose?

A. It applied to all train movements over the road.

Q. 8. Where did these conversations take place?

A. Some on the street and some in my office."

On cross-examination he testified:

"X Q. 9. You were in charge of the operations of the road on that day so far as any railroad employee was in charge, were you not?

A. Yes, sir.

X Q. 10. That is, you were the manager of the railroad on that day, and, so far as any officer of the railroad had charge, you were in control?

A. Yes, sir.

X Q. 11. And did you remain about the offices of the Railroad Company all day?

A. Yes, sir." * * *

"X Q. 12. You were not obliged to transport any passengers on that day unless you saw fit, were you?

A. The Costa Rican Government was running the trains on that day; if they gave us an order we had to submit to it, had to carry it out." * * *

X Q. 13. Were you obliged to take any passengers on your trains that day if you didn't see fit?

A. Yes, sir; under the terms of the concession under which the road was operated.

X Q. 14. Did the Governor-General on that particular day tell you to transport any particular passengers?

A. Naming them?

X Q. 15. Yes.

A. No, sir.

[fol. 39] X Q. 16. Did they tell you on that day to transport some passengers without naming them?

A. Yes, sir.

X Q. 17. What did they say? Give me the express orders.

A. I will have to go back to what I said. I informed the Governor of Limon that the revolutionists were ready to release the train. I told him who was on the train, chiefly, specifying that there were foreign citizens on the train, that is, by that I mean British and American citizens. I said, 'Do you instruct me to move that train?' He said he did.

X Q. 18. You had, in other words, his approval?

A. Yes, sir.

X Q. 19. And if, in your judgment, it were dangerous for those passengers to be transported, would you still transport them?

A. No, sir, I wouldn't. That is, it wouldn't then be common humanity; that is, by that time you would sit down and say you wouldn't do it.

X Q. 20. And having started the train with those passengers, it was your duty as the general manager of the road to employ all the facilities reasonably within your power to avert any accident, was it not?

A. I so consider." * * *

"X Q. 21. Do you know how it was that the United States Consul got the word in regard to the passengers on board of the passenger train?

A. I told him myself.

X Q. 22. So the communication came to you first and you told him?

A. As soon as I heard of the revolution and the seizing of the train and who was on the train—it was a steamship sailing day, as I remember—I gave the American Consul every bit of information I had on the whole matter, plus the desire of the passengers to go on, and what they had been doing to accomplish that desire in Turrialba."

On redirect examination he testified:

"Q. 23. You say as soon as you got the message of the train being held up, you communicated with the United States Consul. Did you communicate with him again after that, or was that the only time you talked with him that day?

A. There are two rooms in my office, that is, my assistant's room and mine. My assistant was in San Jose. The United States Con- [fol. 40] sul was in one of those rooms from the time that I first

reported this holdup to him until well on in the evening, in the office all the time. I was telling him everything that went on.

Q. 24. You kept him informed of everything that went on?

A. Yes, sir." * * *

"Q. 25. You spoke of having the approval of the Governor—I think that was the word you used—to move the passenger train. If the Governor had said 'No, you can't move that train,' would that have been final, or could you have gone ahead and moved it in spite of his saying no?

A. I might have argued it, but if I couldn't argue him out of it, it would have had to be final."

The superintendent, MARSH, testified on direct examination:

"Q. 7. How long have you held that position (superintendent)?

A. Since January, 1918." * * *

"Q. 8. In February, 1918, do you recall a revolution that took place in Costa Rica?

A. Yes, sir.

Q 9. What was the first intimation you had that a revolution was taking place?

A. When a passenger train from San Jose to Limon was captured by revolutionists on February 23d.

Q. 10. You received that word at your office?

A. Yes, sir, through the train dispatcher.

Q. 11. And what did you do?

A. Notified the Governor of Limon.

Q 12. Who was that?

A. Don Antonio Castro." * * *

"Q 13. And why did you notify the Governor?

A. There was a political uprising and we notified the Governor so we could get protection for our property.

Q 14. What relation did he bear to the Government of Costa Rica? He was acting for the president in that locality.

Q. 15. After the passenger train had been held up at Turrialba did you receive a request from the Government officials for a troop train?

A Yes, I did.

Q. 16. Was such a train dispatched?

A. Yes, sir.

Q 17. From what point?

A. Limon.

Q. 18. When was this?

A. About 3.30 in the afternoon.

Q. 19. What was the next you heard about the passenger train [fol. 41] after the troop train had been dispatched?

A. Why, somewhere around 5 o'clock we received a message from Turrialba——'

"Q. 20. As superintendent, did the train dispatcher report to you messages coming to him?

A. Yes, sir.

Q. 21. And did the train dispatcher report the message which he had received?

A. Yes, sir.

Q. 22. Was the message given to you in writing or orally?

A. Orally.

Q. 23. And what did he say?

A. He said that Gomez had released the passenger train.

Q. 24. What did you do when you received that message?

A. I notified the Governor of Limon and asked authority to move the train to Limon.

Q. 25. Did you get that authority?

A. Yes, sir.

Q. 26. And the train was released and moved?

A. Yes, sir." * * *

"Q. 27. Couldn't you move the train without authority from him?

A. No, sir.

Q. 28. Why not?

A. After we notified the Government that this passenger train had been held up by the revolutionary forces we received instructions to return to Limon the westbound passenger train—that is, the train running from Limon to San Jose—and to suspend all regular passenger traffic.

Q. 29. This was an order from the Governor of Limon?

A. Yes, sir.

Q. 30. Did the railroad move any trains at all without getting authority from the Governor during this period?

A. No, sir.

Q. 31. You mean freight trains as well as passenger trains?

A. No trains were moved without authority from the Government.

Q. 32. Do I understand you to say, then, that the Government gave regular authority for moving each train that moved over your lines?

A. Yes, sir.

Q. 33. After you received information of the passenger train held up at Turrialba?

A. Yes, sir." * * *

Q. 34. That is, you wish to testify that for five days the Government was giving the railroad orders on train movements?

A. Yes, sir.

[fol. 42] Q. 35. And during that time no trains were moved without Government authority?

A. No, sir."

On cross-examination he testified:

"X Q. 36. How long had Mr. Chittenden been in the position of general manager of the railroad?

A. Since 1916.

X Q. 37. And is he now?

A. Yes, sir.

X Q. 38. To whom do you report—what officer of the railway company?

A. The manager.

X Q. 39. To Mr. Chittenden?

A. Yes, sir.

X Q. 40. That is, he is your superior officer?

A. Yes, sir.

X Q. 41. Did he give you any directions during that day in regard to the operation of trains?

A. I don't remember whether he did or not.

X Q. 42. You wouldn't say, I suppose, that he did not?

A. No. Ordinarily he doesn't; I don't remember whether he did that day or not.

X Q. 43. That being a special occasion, you don't recall just what he did do on that day?

A. No, sir.

X Q. 44. You wouldn't be likely to make any move on an occasion of that kind without at least conferring with him, would you?

A. I don't know. It all depends on conditions. If I had time to confer with him I would, but if not, I wouldn't.

X Q. 45. If you had an opportunity you certainly would not overlook a conference with him, would you?

A. No.

X Q. 46. And probably didn't on that day if you could reach him, did you?

A. I kept him advised fully all day long of conditions." * * *

X Q. 47. So far as you know, did the train dispatcher report any messages directly to Mr. Chittenden?

A. No, sir; I don't think he reported any. He comes directly under me, and I was on the job all the time.

X Q. 48. You don't know that he didn't, do you?

A. I don't know that he di-n't." * * *

"X Q. 49. You say that you talked with the Governor yourself?

A. Yes, sir.

X Q. 50. Over the telephone or how?

A. No; personally.

[fol. 43] X Q. 51. Where did you talk with him?

A. He came around to the office several times during the day." * * *

"X Q. 52. Did you personally report to what you call the Government, or was it done by somebody else?

A. I made one or two reports. The majority of them were made through the manager's office.

X Q. 53. And when you say that the Government directed the movements of the trains and controlled the trains for five days you mean, do you not, that the information about this largely came to you through the manager's office?

A. Yes, sir.

X Q. 54. And that you know it, therefore, only as they told it to you?
A. Yes, sir."

On redirect examination he testified:

"Q. 55. In the ordinary course of business would your office be the one to regulate train movements, or would you have to refer to Mr. Chittenden's office or some other office?
A. In the ordinary course of business, my office directs the train movements.
Q. 56. Was that true during the period we are talking about in February, 1918?
A. No, sir; it was not true.
Q. 57. During that period what was the difference from the ordinary routine of your office?
A. During that period I received instructions not to operate any trains unless we had authority from the Government to do so. The Government had ordered a suspension of traffic.
Q. 58. Who gave you those orders?
A. The manager's office.
Q. 59. Mr. Chittenden's office?
A. Yes, sir.
Q. 60. Did you report train movements to the Government?
A. No, sir. If we wanted to make a movement of a train we advised the Government what train we wanted to move, and for what purpose and between what points.
Q. 61. And then when you got the authority you would move the train?
A. Yes, sir.
Q. 62. You spoke of the engineer and conductor of the troop train being in the employ of the railroad. What other railroad employees did you say were on that train?
A. The brakeman and fireman.
[fol. 44] Q. 63. And who would be in charge of that train?
A. The conductor.
Q. 64. You said, I believe, you didn't know who was in charge of the troops?
A. I do not.
Q. 65. The commander?
A. I do not.
Q. 66. Do you know whether the conductor was under the orders of the commander of the troops?
A. ——.
Q. 67. Do you know?
A. Our orders were to run the train to Turrialba.
Q. 68. Well, do you know whether the conductor was under the orders of the commander of the troops?
A. He was——
Q. 69. Well, do you know—is the question—of your own personal knowledge?

A. No." * * *

Q. 70. Did you notify the Governor when you learned of the release of the passenger train?

A. Yes, sir.

Judge Perkins: Do you mean that you did yourself personally?

The Witness: I did personally—around five o'clock.

Q. 71. When you got word of the release of that train, you notified the Governor?

A. Yes, sir.

Judge Perkins: Did you personally do that?

The Witness: I did it through the manager's office, too." * * *

"Q. 72. Did the Government authorities use your telephone and telegraph wires for their own purposes during this period?

A. Yes, sir.

Q. 73. And that was true during the afternoon of February 23d, the day of the accident?

A. Yes, sir."

On recross-examination he testified:

"X Q. 74. And there was nothing that took place respecting the operation of the road on that day except when instructions or directions were issued through or approved by the general manager's office. Is that not so? When I say 'on that day' I mean after the news of the seizure of the train at Turrialba was received.

A. I wouldn' say that. I would say that I kept the manager fully informed throughout the day. If I could get hold of him on quick notice I usually conferred with him; otherwise I acted on my own responsibility.

[fol. 45] X Q. 75. Whenever you could, you sought his instructions or approval, did you not?

A. Yes, sir.

X Q. 76. And his office was in communication with the Government officials?

A. Yes, sir."

On redirect examination he testified:

"Q. 77. But when it came to train movements, you always got the approval of the Government through Mr. Chittenden?

A. Yes, sir."

The chief train dispatcher at Limon, POWERS, testified on direct examination:

"Q. 1. Now, in the train dispatcher's office are you under the superintendent and the manager?

A. I report direct to the superintendent.

Q. 2. And who was the superintendent at that time?

A. Mr. M. M. Marsh.

Q. 3. And who was the manager?

A. Mr. G. P. Chittenden.

Q. 4. You reported the capture of the train to one or both of them?

"Q. 5. What time was this passenger train captured by the revolutionists as near as you can remember?

A. About 11.30 a. m.

Q. 6. How did you receive that message—by telephone or telegraph, or how?

A. By telephone; over the train dispatcher's telephone. The station agent at Turrialba notified me first that the rebels there had taken over the train and were taking some of the passengers off the train that they wanted. I believe they were relatives or relations of the then President of the Republic. And they used his office as a jail * * *"

Q. 7. Now, what trains were dispatched out of Limon? What trains did you dispatch out of Limon that afternoon?

A. I only dispatched one.

Q. 8. What was that?

A. A Government special with troops.

Q. 9. And what time did that leave?

A. Well, that left in the neighborhood of about 3.30 p. m.

Q. 10. Did you have anything to do with getting that train ready, or getting the engine ready?

A. Why, I ordered the engine from the engine-house on orders from Mr. Marsh * * *"

[fol. 46] "Q. 11. During that afternoon after the passenger train had been captured, did you receive any unusual instructions about dispatching trains?

A. Yes, sir; I received instructions from Mr. Marsh that no trains were to be sent out without orders from him.

Q. 12 That is not the ordinary practice?

A. No, sir.

Q. 13. And after that did you always refer to him for orders before dispatching trains?

A. Yes, sir. May I put in there why that was?

Q. 14. Well, if you know.

Q. 15. Did Mr. Marsh in his orders tell you?

A. Yes; he told me we were not to run out any trains without orders from him, and he couldn't run any out without orders from the Government."

The testimony of Chittenden, Marsh and Powers was taken by the defendant on depositions before the trial.

DINGLEDINE, the assistant train dispatcher at Limon, testified for the defendant on direct examination at the trial as follows:

"Q. 1. Did you see the Governor of Limon at the office of the railroad?

A. I did.

Q. 2. How much of the time was he there that afternoon and evening (February 23)?

A. After 5 o'clock until a short time before the passenger train arrived he was there most of the time, in and out.

Q. 3. You weren't there yourself until 5 o'clock?

A. Not until 5 o'clock.

Q. 4. Whether he was there during the day before that you don't know?

A. I don't know.

Q. 5. And was the Governor using the railroad line at times, telephone line?

A. He was, to telephone, the dispatcher's telephone."

At some time while the passenger train was being detained at Turrialba a written message was prepared and signed by the passengers about which the plaintiff testified on direct examination:

"We asked (Ramsay) to telephone this message. I didn't have a great deal to — with that. Mr. Grant prepared that and I signed it and the other Americans signed it.

[fol. 47] Q. 163. And this was a message to whom?

A. To the American Consul in Limon telling him that we were in trouble there, and I don't know whether we said our train was liable to be fired into or not, but we wanted to get out; that was the amount of it.

Q. 164. Do you know about what time that was?

A. Why, no, I don't. It was somewhere about twelve o'clock or so. We didn't stay there long until we tried to get out." * * *

"Q. 165. Was there any other message sent to Limon that you know anything about? That is yes or no.

A. I don't know of any.

Q. 166. Didn't know of any other? Did you know of any message about calling for an engine?

A. Yes, but I didn't know of it.

Q. 167. You knew nothing about it?

A. I didn't have anything to do with it."

The plaintiff testified on cross-examination:

"X Q. 168. Now, I think that you said that at some time while you were there a message was got up and signed to the United States Consul down at Limon?

A. Yes." * * *

"X Q. 169. Now, you got away, didn't you, about two hours and a half after that was sent down?

A. Why, yes, I don't know just when we did send that down.

X Q. 170. I think Mr. Grant testified at the last trial that it was about two hours and a half after you sent it?

A. Well, he would know more about it than I would."

GRANT testified on direct examination:

"Guardia at this time had stated that if we could get the Fruit Company, the Northern Railroad Company, to send another loco-

motive to replace the one that we was using, he saw no objection to our leaving. We attempted to combine both of those objects in one telegram by drawing up a telegram to the American Consul which stated that we were being held, that the revolutionists had offered to release us if a second locomotive was sent. This was addressed to the consul so that he could be informed of the situation that we were in and so that he might do what we would reasonably expect as an American Consul, and make all efforts necessary to protect passengers on this train. After drawing that up we gave [fol. 48] that to Mr. Ramsay. Mr. Ramsay took this message into the telegraph office and after some little time, some minutes, came back and stated that he had been in communication with Limon and that they would not accept any other business over the company telephone line except railroad business, and handed back the message that we had signed to us."

On cross-examination he testified:

"X Q. 39. You testified with reference to a telephone message which you wrote out; I think you said you wrote it out yourself?

A. My impression is.

X Q. 40. That was to be a message directed to the United States Consul?

A. Yes, sir.

X Q. 41. And suggested, among other things, that the rebels would let this engine go if they could have another one?

A. That was the wording of it; yes, sir." * * *

"X Q. 42. Now, as a matter of fact you got away about two hours and a half after that incident, did you not?

A. Approximately so; yes, sir; two hours and a half or three hours."

The defendant's counsel in his opening statement to the jury stated:

"It is said that Mr. Ramsay telephoned a message down to the United States Consul. We shall show you that the telephone line that ran down was nothing but a railroad line. It was not part of any public telephone system. It was not connected with the consul's office. And, furthermore, a large part of the message was to the effect that, 'If you send up another engine the rebels say they will let this one go.' You can imagine whether or not the railroad or the Government would choose to give the rebels another engine."

Ramsay testified on direct examination:

"Q. 6. Now, at some time during that afternoon was there a signed message to the United States Consul handed to you by the passengers?

A. There was.

Q. 7. And did you then telephone down the line to the railroad office about that?

A. I did." * * *

[fol. 49] "Q. 8. And when this message was given you by the passengers did you read that to Powers?

A. I did, all but the signatures.

Q. 9. And did you report to the passengers what he had said to you?

A. I did." * * *

"Q. 10. Now, you say you reported to Mr. Ryan and the other passengers something after your telephone conversation with Powers about that message. What did you say to the plaintiff?

A. I reported to the plaintiff that I communicated the message to the officials at Limon and they gave me back that they were not doing any business with the revolutionary forces.

Q. 11. Anything about sending up another locomotive?

A. They said—Oh, wait just a moment. Do you mean did I tell them about sending up another locomotive?

Q. 12. There was something in the message about getting another locomotive sent up, wasn't there?

A. The substance of that message, if I remember correctly, was that the message read that Guardia and Gomez had agreed to release the passengers provided that the company would furnish them another engine.

Q. 13. And you reported in substance that the company would not do business with the rebels?

A. I did."

On cross-examination he testified:

"X Q. 14. Now, your message, as I understand, essentially was as indicated by the passengers, that the rebs would let the train go providing Limon or the railroad would furnish them another engine. That was one of the statements in your message, wasn't it?

A. That was one of the statements." * * *

"X Q. 15. Your message about the engine, did that go over the line at about one o'clock, do you think?

A. What engine do you mean, the one that I had?

X Q. 16. No; your message about the engine, did you telephone that about one o'clock?

A. It was to my best recollection along some time in the middle of the afternoon. I couldn't say definitely; around about three o'clock."

CHITTENDEN testified on cross-examination:

"X Q. 26. Did Ramsay, so far as you know, telephone from Turrialba stating that the passengers desired an opportunity to communi-[fol. 50] cate over the wire with the United States Consul?

A. I believe he did.

X Q. 27. Did he send the names of the passengers who desired to communicate with the consul?

A. In one of my conversations with him he told me three or four names.

X Q. 28. Where was that from?

A. I was in Limon and he was in Turrialba. I was then talking with him over the dispatcher's telephone.

X Q. 29. What do you say in view of the testimony of Ramsay that he was refused permission for the passengers to talk over the telephone line?

A. He was refused permission for passengers to talk over the dispatcher's telephone line.

X Q. 30. It is a fact?

A. Yes, sir.

X Q. 31. Now, then, did the consul have the message that you referred to?

A. Either Marsh or I notified the consul, gave the message to the consul. In other words, the consul was kept in close touch with nearly everything we did that day."

MARSH testified on cross-examination:

"X Q. 78. Did you have any conversation with him about the revolutionists stating they would release the engine if the company would supply them with another?

A. No, sir.

X Q. 79. You had no such talk with him?

A. No, sir.

X Q. 80. So that whatever message Ramsay sent of that kind did not come directly to you?

A. I don't know of any message of that kind." * * *

X Q. 81. Do you remember to have heard from the train dispatcher that any message came from Ramsay that if the company would furnish another engine the revolutionists would release the one they had?

A. No, sir."

X Q. 82. Don't remember anything of that kind? No, sir." * * *

"X Q. 83. Was it communicated to you that on the passenger train there were certain American citizens as passengers?

A. The first I knew of it was after the accident. The first time it was brought to my attention was after the accident at Pascua.

X Q. 84. Was it reported to you what pasesngers were on that train before the accident?

A. No, sir." * * *

[fol. 51] "X Q. 85. Do you know anything about any refusal being made by the general manager or by the train dispatcher or any official at the station in Limon to a request for permission by the passengers of the passenger train to use the telegraph or telephone lines to Limon?

A. No, sir.

On redirect examination he testified:

"Q. 86. Is it customary for you or your office to receive any instructions as to whether American citizens are on passenger trains being run by the railroad?

A. No, sir.

Q. 87. Did you ever know of this information being given in ordinary times?

A. No, sir.

Q. 88. Did you ever know of its ever being given?

A. No, sir." * * *

POWERS testified on direct examination:

"Q. 16. After you received word that the revolutionists had captured the train at Turrialba did you receive any further messages from the agent at Turrialba or from the office at Turrialba?

A. I talked with Mr. Ramsay over the telephone at Turrialba. Mr. Ramsay was the conductor of the train. He told me he had a message for the manager. I asked him what the message was and he advised that it was from Gomez, who was head of the revolutionary forces, requesting that we furnish him another engine.

Q. 17. What did you tell him?

A. I advised Mr. Ramsay that we had no engine available on account of having a banana pick-up out on that day, and we had no engine available which could be furnished him at that time.

Q. 18. Could you get any engine from San Jose?

A. I had no communication with San Jose because the telephone and telegraph wires had been cut by the rebels." * * *

"Q. 19. Do you remember how long after you got word of the capture of the passenger train it was that you got this message asking for another engine?

A. Why, I would say it was in the neighborhood of an hour and a half."

He testified on cross-examination:

X Q. 20. You say that you talked with Ramsay about one o'clock, you think, do you, on that day?

[fol. 52] A. About that time. It was about an hour or an hour and a half after the train was held up.

X Q. 21. I took your figures on it. You said you thought about an hour and a half after the train was held up. You have stated all the information that Ramsay gave you at that time?

A. Yes, sir." * * *

"X Q. 22. At about what time was it that you received the inquiry whether you would furnish another engine?

A. About an hour and a half after the train had been stopped at Turrialba.

X Q. 23. You got that, then, from Mr. Ramsay?

A. I got that from Mr. Ramsay, the conductor of the train.

X Q. 24. And did he state at that time that if you would furnish another engine the revolutionists would release the one that was held at Turrialba?

A. If I remember correctly, it was something like that. I never took the message; I just took it verbally from conductor Ramsay."

It appeared in evidence that before the troop train was made up there were only two engines in the yard at Limon. One was a

switch engine used only for yard movements. The other one was without steam up until it was taken for the troop train. It takes about two to three hours to get steam up.

Concerning the time the train left Turrialba, the plaintiff testified on direct examination:

Q. 171. Then how much longer did you remain there?
A. We stayed there until somewhere about five o'clock."

On cross-examination he testified:

"Limon. We left there—let me see—about five o'clock we left Turrialba and we got to Limon somewhere about midnight." * * *
"X Q. 172. Now, you were at Turialba from about 11.30 to about half past five?
A. I should say about half past five."

Ramsay testified on direct examination:

"Q. 17. And what time did you finally get away from Turrialba?
A. About 5.30 P. M." * * *
"Q. 18. When you were finally released from Turrialba you got the word from Gomez or Guardia that you were going to be given back the engine?
A. Yes, sir.
[fol. 53] "Q. 19. And about what time was that?
A. This was about 5.20 p. m.
Q. 20. Anything said to you by either of them at that time that some of the men were going down to Torito?
A. Not at that moment; no."

He testified on cross-examination:

"X Q. 21. Now, Mr. Ramsay, when your train was in Turrialba, or, rather, your train left Turrialba about a quarter of six o'clock, did it not, that night?
A. Well, as I remember, it left around 5.30 p. m., to the best of my recollection.
X Q. 22. If it appears by the testimony of the dispatcher that it left at 5.45, would you contradict that?
A. No, I wouldn't contradict that, because he would know, probably have a better recollection of just the exact time than I would.
X Q. 23. Your idea is it was about that time, about half past five?
A. Yes, sir."

Veitch testified on direct examination:

"Q. 8. Now, at some time you learned that the train was to be allowed to proceed?
A. Yes, sir.
Q. 9. How long was that after the engine came back from that trip up the line which it was taken on?
A. I am not very certain on that point, but I should say about half

an hour, three-quarters of an hour; but I am not very certain on that point.

Q. 10. And what time would you say it was that the train left Turrialba?

A. About 5.30 to 5.45."

DINGLEDINE testified on direct examination:

"Q. 6. After you went on duty at five o'clock did you get any word from Mr. Ramsay?

A. From Turrialba?

Q. 7. Yes.

A. No, not a word, not until he was released by the rebels.

Q. 8. Did you get word at that time?

A. Yes. Directly after I started to work, about 5.15, I should say, 5 or 5.15.

Q. 9. You got word that the train had been released?

A. Yes, sir.

CHITTENDEN testified on direct examination:

[fol. 54] "Q. 32. Do you recall when that train was released by the revolutionists?

A. More or less as an approximate time, around 5 to 5.30 in the evening of the same day. I believe that is the hour at which I was informed that it had been released, that is, the revolutionists were willing to allow it to proceed."

He testified on cross-examination:

"X Q. 33. You received word, Mr. Chittenden, I understand, at somewhere about 5 to 5.30 on the fatal day of the release of the passenger train by the revolutionists?

A. Yes, sir.

X Q. 34. And I take it that you have every reason to believe that you got prompt report of the release of the train after the release actually occurred—do you think so?

Mr. Raymond: I object to that as being immaterial.

A. I think so."

MARSH testified on direct examination:

"Q. 89. What was the next you heard about the passenger train after the troop train had been dispatched?

A. Why, somewheres around 5 o'clock we received a message from Turrialba——" * * *

"The Witness: No, it was just transmitted from the agent at Turrialba to the train dispatcher at Limon." * * *

"Q. 90. And did the train dispatcher report the message which he had received?

A. Yes, sir." * * *

"Q. 91. And what did he say?

Judge Perkins: Just a moment. I shall object to that as hearsay.
Mr. Raymond: I am asking for a report received in the usual course of business of the railroad.
Judge Perkins: Of course, the answer will have to be taken subject to the objection.

A. He said that Gomez had released the passenger train."

On cross-examination he testified:

"X Q. 92. The passenger train left Turrialba after the troop train left Limon?
A. Yes, sir.
X Q. 93. Do you know how long after?
A. Well, a little over two hours; about two hours and fifteen minutes.
X Q. 94. So the passenger train left Turrialba between half past five and six o'clock?
A. Yes, sir."

[fol. 55] On redirect examination he testified:

"Q. 95. Did you notify the Governor when you learned of the release of the passenger train?
A. Yes, sir.

Judge Perkins: Do you mean that you did yourself, personally?
The Witness: I did, personally.

Q. 96. And what time was that, do you remember?
A. Shortly after seven o'clock that evening.
Q. 97. I mean the release of the passenger train from Turrialba.
A. Oh, that was around five o'clock."

POWERS testified on cross-examination:

"X Q. 25. Do you know what time the passenger train pulled out of Turrialba?
A. It left Turrialba in the neighborhood of about 5.45."

CHITTENDEN testified on cross-examination:

X Q. 35. And so far as you personally knew, from your own knowledge, direct knowledge, the conductor of the troop train was in ignorance at the time he arrived at La Pascua that all the revolutionists had left the passenger train?

Mr. Raymond: I object. It seems as though the question should first ask whether the witness does know.
Mr. Perkins (to stenographer): Please read the question.

[Question read as follows:] "And so far as you personally knew from your own knowledge, direct knowledge, the conductor of the troop train was in ignorance at the time he arrived at La Pascua that all the revolutionists had left the passenger train?"

X Q. 36. This is confined, Mr. Chittenden, to your own actual personal knowledge, not to anything that was told you?

A. I don't think he ever knew how they got on it. I don't believe the conductor of the troop train ever knew there were any revolutionists on the train when they left Turrialba until he had his conversation with conductor Ramsay just east of Pascua.

X Q. 37. Well, your answer is not quite responsive. I infer from it that you mean to say that so far as you know the conductor of the troop train, if he ever knew there were revolutionists on the passenger train, believed they had left it?

A. Yes.

X Q. 38. Before the troop train left Limon, the train men were [fol. 56] informed, were they not, that the passenger train at Turrialba was in the hands of the revolutionists?

A. Yes, sir.

X Q. 39. And that is what the troop train started out for, I suppose, was it not, to release that train?

A. The train wasn't the objective; no, sir.

X Q. 40. How far was the troop train to proceed?

A. To Turrialba, where there was a considerable force. They were fighting against the unrecognized government of Tinoco.

X Q. 41. That is, Turrialba was the destination of the train?

A. Yes, sir; but it was the revolutionary force that was the objective of these troops, not the train.

X Q. 42. And the commander of the troops and the train crew knew that this passenger train was in the hands of the revolutionists?

A. Yes, sir.

CHITTENDEN testified on direct examination:

"Q. 43. Now, about that time (testified by him to have been between 5 and 5.30 p. m.), did you have a talk with the Governor of Limon regarding the release of that train?

A. I notified the Governor that the train had been released. I then told the Governor that I would not move the train without instructions from him, as I had been receiving instructions from him as to the movement of trains, practically orders as to train movements, ever since the moment the passenger train had been seized by the revolutionists at Turrialba." * * *

"Q. 44. Now, when you received word of the release of the passenger train, did you communicate that fact to the Governor?

A. I did.

Q. 45. Did he give authority for moving the train?

A. He did.

Q. 46. Was anything said at that time between you and the Governor regarding notification of this release being sent to the troop train?

A. I reminded the Governor that he had a troop train—to the best of my recollection, I reminded the Governor that he had a troop train on the line. I say that because I told him practically where all trains were.

Q. 47. Go ahead and tell us what your conversation with the Governor was.

A. I told the Governor where various trains were on the line. As [fol. 57] I remember it, the troop train was on the line at that time between Limon and Siquirres.

Q. 48. Was anything said about notifying the troop train?

A. I told him he had better notify the troop train. He said he would. Afterwards he said he did. He had an extension of the United Fruit Company telephone in his office which permitted him to call up Siquirres. He did not have an extension of the dispatcher's wire—so that it was perfectly possible for him to do as he said he would.

Q. 29. He had a telephone in his office that communicated with Siquirres?

A. Yes, sir; a United Fruit Company wire, not a Northern Railway dispatcher's telephone wire."

CHITTENDEN testified on cross-examination:

"X Q. 50. Now, at that time, that is, when you received word of the release of the passenger train, the troop train was on the road, was it not?

A. Yes, sir.

X Q. 51. That is, the troop train left Limon at about half past three?

A. Yes, sir.

X Q. 52. That is the testimony of Mr. Marsh, and I suppose you would not controvert that?

A. No, sir.

X Q. 53. And did you personally communicate to the train men on the troop train that the passenger train had been released?

A. No, sir.

X Q. 54. Did you know that there were non-combatants on the passenger train at Turrialba?

A. Yes, sir.

X Q. 55. Did you know that there were women and children non-combatants on the train?

A. Yes, sir.

X Q. 56. And did you know that there were foreigners to Costa Rica on the train?

A. Yes, sir.

X Q. 57. You knew that at the time that you were informed the train had been released by the revolutionists, did you not?

A. Yes, sir.

X Q. 58. Did you direct any employee of the road, train dispatcher or others, to communicate to the train men of the troop train the fact that there were non-combatants and non-combatant [fol. 58] passengers, including women and children, on the passenger train?

A. Yes, sir.

X Q. 59. At what time did you communicate that?

A. The last communication was through the agent at Las Lomas.

X Q. 60. And that was done through the train dispatcher?
A. That was done through a yard master at Siquirres.
X Q. 61. And how did you reach the yard master at Siquirres?
A. Over the telephone.
X Q. 62. Did you do that personally?
A. I did that personally.
X Q. 63. When was that with reference to the time that you received notice that the passenger train had been released? With reference to that time when did you talk with the yard man at Siquirres?
A. I talked with the yard man at Siquirres just before the troop train left Siquirres.
X Q. 64. And was that after the report to you that the passenger train had been released at Turrialba?
A. No, sir; because the orders given for the two trains to meet here was communicated to the troop train at Las Lomas, as to the best of my knowledge and belief. I haven't the train sheet before me, but as I remember it that was it.
X Q. 65. Then, as I gather it, your talk with the yard master at Siquirres was before you got the report that the passenger train had been released at Turrialba?
A. I may have led you to suppose so. I told him to tell the agent at Las Lomas to tell the conductor of the train. That was supplemental to orders given by Mr. Marsh.
X Q. 66. Are you positive whether it was before or after you had the report of the release?
A. I can't swear to it; no, sir.
X Q. 67. Do you know the hour—are you able to fix the hour when you got the yard master at Siquirres?
A. No, sir. The way I know it was communicated was his acknowledgment of the receipt that we had told him."

Marsh, the superintendent, testified on direct examination that he saw the troops before they embarked on the train and that there was nothing about his appearance to lead him to believe that they [fol. 59] were excited, and he testified that the troops appeared "perfectly normal and under the control of their leaders."

The chief train dispatcher, Powers, a witness for the defendant railway, was on duty at the office in Limon from 5 a. m. to 5 p. m. on the day of the accident.

Powers returned to the train dispatcher's office at 5.30 o'clock p. m. and remained there with the assistant, Dingledine, until after the accident occurred.

Powers testified that he was present when the orders to meet and pass were telephoned by the assistant, Dingledine, to the troop train and to the passenger train, and stated on direct examination that the order to the passenger train was: "Engine 38 run Paralta to Siquirres as an extra. Meet Special West engine 48 at Pascua." And that the order to the troop train was: "Engine 48 run Siquirres to Paralta as a special to meet extra east engine at Pasqua."

VERNER B. DINGLEDINE testified for the defendant on direct examination that he was the assistant train dispatcher for the defendant at the time of the accident, and that he was still in the employ of the defendant in that capacity, and further testified as follows:

Q. 10. After you went on duty at 5 o'clock, did you get any word from Mr. Ramsay?

A. Yes, directly after I started to work, about 5.15, I should say—5 or 5.15.

Q. 11. You got word that the train had been released?

A. Yes, sir.

Q. 12. Was anything said at that time about any revolutionists having jumped on it?

A. No, sir.

Q. 13. Now, what was the next message, if any that you got from that passenger train on its way down?

A. I got a message from Ramsay from Paralta.

Q. 14. Paralta?

A. Being where he got fresh orders, at Paralta, he filed a message there which read something like this: * * * "All the rebels have gotten off the train at Torito with the intention of destroying the bridge and disconnecting the track" * * *

"Q. 15. When you got that message from Paralta that the revo-
[fol. 60] lutionists had gotten off the train at Torito to destroy the bridge, up to that time had you any word that any revolutionists were on that train?

A. No, sir.

Q. 16. After you got the message from Peralta, did you communicate with the troop train?

A. I did.

Q. 17. By telephone? To what station?

A. Las Lomas. * * *

Q. 18. When, if at all, did you give instructions to the troop train to pass this down passenger train?

A. I did at Las Lomas.

Q. 19. And what message did you send through to Las Lomas?

A. Sent the conductor of the troop train a message.

Q. 20. What was it that you telephoned up there?

A. First, put out a train order to meet the train at Pascua, I sent in a message which read something like this: 'Special 38 east has no revolutionists on the train.'

The Court: Your order said 'Special?'

The Witness: Special 33 East has no revolutionists on board * * * or something to that effect.

Q. 21. And you gave them orders to pass it?

A. At Pascua.

Q. 22. Was that the substance of the communication that you sent?

A. Yes, sir.

Q. 23. Now, you yourself hadn't telephoned, had you, to that train when it was at Siquirres?

A. When I heard the troop train at Siquirres I notified the conductor there that the passenger train had been released and, 'I will give you meet orders later.'

By Mr. Perkins:

Q. 24. Are any of these orders in writing?

A The orders are in writing that I sent.

Q. 25. Have you got them here?

A. I don't have them. That is, I sent them that way, but they were copied in writing and delivered in the same manner as any telegram to the conductor of the train.

By Mr. Dodge:

Q. 26. It was an oral telephone message by you from Limon to Las Lomas?

A. Yes, to the agent at Las Lomas, who would write it the same as any ordinary telephone message and deliver it to the conductor with his train orders in the same manner.

[fol. 61] Mr. Perkins: Wait a moment. You were asked what message you delivered.

Q. 27. What message you sent.

Mr. Perkins: Now he states that there are records of these messages, and I submit, as this witness has come here for the purpose of testifying, he ought to have these records here.

Mr. Dodge: In the first place, it isn't his records. Nothing is put in writing by him, as I understand it.

The Witness: No, sir.

The Court: It is apparently an oral order which the person who gets it afterwards reduces to writing. I think that the oral order is competent.

The Witness: That is correct.

He testified on cross-examination:

X Q. 28. You have no memoranda here of the conversations which you had with any of the agents, have you?

A. No, sir.

X Q. 29. None whatever?

A. Not that I know of. I haven't any.

X Q. 30. You are testifying wholly from what your memory recalls now of what took place five years ago?

A. Yes, sir."

Marsh testified on direct examination:

"The Witness: The orders were in writing. All orders to trains were issued in writing.

Q. 98. You don't mean by that that they were written and sent out in a written form from your office?

A. Telegraphed to the operators, who wrote them out and handed them to the train crew and received a receipt,—that is, a signature. * * *

Q. 99. You said, I believe, that the train dispatcher had no written orders in his office. Did you mean to testify there were no records in the train dispatcher's office?

A. No, sir.

Q. 100. Were there records kept?

A. Yes, sir.

Q. 101. Of train movements?

A. Yes, sir.

Q. 102. You said that the train dispatcher would make a notation of anything affecting train service. Is that correct?

A. Yes, sir.

Q. 103. Was it in his discretion whether he should make a notation of anything affecting train service, or was that something he would [fol. 62] make a note of anyway?

A. His duties are to make notes of anything that affects train service in any way.

Q. 104. So when you testified it was within his discretion whether he should make a note you meant that it was within his discretion whether the message did affect train service?

Mr. Perkins: Objected to as leading.

A. Yes, sir.

Respecting the movements of the passenger train, it appeared in evidence that the station agent at Turrialba reported the capture of the passenger train by telephone to Limon within a few minutes after it occurred.

The conductor of the train, RAMSAY, testified on direct examination concerning what took place at Peralta:

"Q. 25. At Peralta did you telephone down to Limon again?

A. At Peralta I received a train order to meet special west at Pascua. In the meantime, if I remember correctly, I left a message there advising the dispatcher that Torito bridge would be obstructed, that some revoluntary forces got off there to blow up the bridge."

On cross-examination he testified:

"X Q. 26. Now, at Peralta, I understand when you arrived there you say you left a message with the station agent?

A. Yes, sir.

X Q. 27. And that message was that you had left revolutionists at Torito, wasn't it?

A. Yes, sir."

CHITTENDEN testified on cross-examination:

"X Q. 68. Did you take the message from Ramsay?

A. No, sir.

X Q. 69. If his testimony was that he reported that there were

some of the revolutionists left the train at Torito, you wouldn't be able to deny, would you, that that was his report?
A. No, I wouldn't."

The passenger train received no message or orders after it left Peralta until after the accident.

RAMSAY testified:

"Q. 28. Now, you didn't know where the troop train was at the [fol. 63] time that you were at Turrialba? You didn't know where it was, did you?
A. When I was at Turrialba?
Q. 29. Yes.
A. I didn't know anything about any troop train. The only thing that I knew was, I had orders to meet a special west.
Q. 30. You didn't know that there was any special west until you got to Peralta?
A. No, sir.
Q. 31. And you didn't know where it was, did you, at that time?
A. At Turrialba?
Q. 32. At Peralta.
A. At Peralta at that moment that I received the train order I didn't know where it was."

Respecting communication over the Railway Company's lines on the day of the accident, POWERS, the chief train dispatcher, testified on cross-examination:

"X Q. 26. The telephone line was open between your office and Turrialba all the afternoon, so far as you know?
A. Yes, sir.
X Q. 27. So that La Junta, Las Lomas, La Pascua, Peralta and Turrialba were all available for communication?
A Yes, sir; but there was no telephone operator at Pascua or La Junta." * * *
"X Q. 28. How was the service that you had over the telephone that day to Turrialba—was it clear and satisfactory?
A. Yes, sir.
X Q. 29 Did you have any occasion to talk with the operator at any other stations yourself?
A That is, west of Peralta, or what stations?
X Q. 30. Did you have any occasion to talk to the operator at Siquirres during the day yourself?
A. Yes, sir; worked with him up to 5 p. m.
X Q. 31. And at Las Lomas?
A. Yes, sir.
X Q. 32. With what frequency were you using the line, do you think, during the afternoon?
A. Why, I was working with Siquirres every ten or fifteen minutes."

Ramsay testified:

In connection with the telephone that we used, we couldn't call any station. The only station that we could get would be Limon. [fol. 64] We couldn't take the telephone that we were using, the selective system—we couldn't call any agent along the line. If we called this agent, we have got to ask the dispatcher to call him for you."

"Q. 33. For what reason—for mechanical reasons or for rules?

A. It was the way the telephone system is built, the selective system. The dispatcher can ring any line anywhere on the line, but any agent can't call another agent along the line over the telephone.

Q. 34. Then tell me what difficulty there was, if any, of the station agent, or you, or any of the railroad men at Turrialba communicating to Limon the exact situation there, and Limon communicating to Siquirres the exact situation at Turrialba. What difficulty was there of you communicating to Limon and Siquirres communicating to Limon the exact situation of your two trains, any?

A. None.

Marsh, the superintendent, testified:

Q 105. Did you get any message that the passenger train had left any troops at Torito bridge before the accident?

A. No—I don't remember exactly. I have a faint recollection of something being said.

Professor Roscoe Pound was called as a witness by the plaintiff and testified as follows:

Q. 1. You are Roscoe Pound, Dean of Harvard Law School?

A. Yes, sir.

Q. 2. How long have you been Dean of the Harvard Law School?

A. Since 1915.

Q 3. What attention have you given to the study of the law of Costa Rica?

A. Why, I have been teaching and studying the civil law, which is the basis of the law of Latin-American countries, since 1899. I have been generally familiar with the codes of those countries since that time. As to the law of Costa Rica, I have looked that up more especially in certain connections within the last few months, so that I think I am reasonably familiar with it.

Q. 4. Are you familiar with the code of Cost Rica and with the decisions of the Court of Last Resort?

[fol. 65] A. I should say I am familiar with the code. As to the decisions, I have looked them over sufficiently to see if there was anything in them different from what one should expect from a code of that type essentially modeled on the French code of 1804, and there seemed to be only a few decisions bearing on the matters that I was called upon to look into, so I think I am familiar with what the courts decided on those sections.

Q. 5. What system of law prevailed in Costa Rica in 1918?

A. A code based upon the French Civil Code of 1804 with certain supplementary legislation, and what we call the civil or modern Roman law, which is the law of about half the modern world.

Q. 6. How do the civil and common law differ, if at all, in respect to the liability of common carriers for damages for negligence?

Mr. Dodge: Now, if your Honor please, I understand the witness to say that the civil law of Costa Rica is contained in a code, a code founded upon the civil law, I think he said.

The Court: I thought the witness said it was based on the French code of 1804, and in addition it followed the general principles of the civil code. Is that it, Professor Pound?

The Witness: Yes, that is substantially it. I can testify as to the code. I have examined the code many times.

Mr. Dodge: Did I understand the witness to say that there is any law outside of the written law?

The Witness: Oh, yes, in this sense: The code uses all sorts of terms which are terms of the civil law, and it is no more possible to understand the code, except in the terms of the civil law, than it would be to understand a great deal of the legislation of Massachusetts without knowing the common law.

By Mr. Dodge:

Q. 7. But at the same time there is no common law in the sense in which we have it?

A. Only in the sense that it is the background of interpretation and application of the code, as much as in California, where they have a code, but you can't tell what it means without continually asking yourself what is the common law. It is declaratory.

Q. 8. But it is a question entirely of interpreting the code?

[fol. 66] A. Interpreting the code, not as something made new over night, but as something that is essentially declaratory of the civil law.

Q. 9. Exactly; but the first step is the code, then the question is what the code means?

A. Well, yes, but it depends on some things. Take one matter that my attention has been called to, as to the phrase "solidary." The code does not define "solidary." You are expected to know what that is, because that is a general term of the civil law.

Q. 10. It is a question of defining a word which is in the code?

A. It is a question of the interpretation of a code, not in the sense in which we interpret legislation, a body of rules, but it is a great body of principles, to be developed and applied according to the principles of the civilian's technique, just as we apply our legislation according to our technique.

Q. 11. What I mean is this: that whatever you have to resort to by way of interpretation, it is entirely a question of interpreting the written code?

A. Yes, but in a much broader sense than we use in interpretation.

Q. 12. I understand that.

A. In a much broader sense, but you begin with a section undoubtedly.

The sections of the code which are pertinent to the present litigation are sections 1045 and 1048 of the Code of Costa Rica. Section 1045 provides in a general way that anyone who through his fault causes injury to another is bound to make reparation for that injury. If a corporation is to be held under this section, the negligence must be that of a person who stands in the position of "representative." The decisions in the courts in Costa Rica in railroad cases consider that the person who is in charge immediately of the operation is for that operation a representative. The corporation would be liable as represented by him under Section 1045 for his fault. The responsibility of a corporation for the acts of subordinates of a representative is dealt with in the following section 1048.

Section 1048 makes a corporation—called a "moral person"—liable for injury through fault or imprudence or negligence of a subordinate where it has not chosen a competent and reasonable [fol. 67] person for the position; or where it has not supervised the conduct of the employee with due diligence—with the care of a diligent head of a family—with the care of the reasonable man of our law. "In Massachusetts, I believe, there is a liability to a passenger for a high degree of care. The doctrine in Costa Rica is uniform. It is the care a diligent head of a family, a prudent and diligent person who is his own master. There is no special degree of care due toward passengers." Under Section 1048, "The carrier may escape liability by saying that he chose an apta persona, a competent person, and that his operations were supervised diligently so that the accident could not have been prevented by due diligence on his part." Those are the words of Section 1048, "could not have been prevented by due diligence on its part."

There is a reported case in Costa Rica of bulls which escaped from a shipment over a railroad in which the court held that the negligence of the conductor in charge of the train came under Section 1045, because he was in charge immediately of the operation—a vice-principal in the terms of our law.

On cross-examination the witness testified substantially as follows:

There would be no liability without negligence under the Costa Rican law. You have got to find negligence somewhere (with an exception not pertinent).

X Q. 13. In a case not arising out of direct contract between a person and a locomotive or car it comes down, as I understand you, substantially to the same law as we have in Massachusetts except as to the degree of care?

A. That is about the substance of it. You wouldn't, except for theoretical, doctrinal purposes, get very different results. The practical results would be about the same.

Article 1181 of the code provides that contract actions against carriers expire six months after the completion of the voyage. An

action against the carrier brought after six months must be an action of tort and not of contract.

Article 73 of the Railroad Law of Costa Rica was introduced in [fol. 68] evidence. Translated it reads as follows: "In case of war or internal discord the Government may order the suspension of traffic of one or several railroad lines or on any section of them, or utilize traffic exclusively for defense. In that case the nation shall indemnify the companies," with further provision regarding the method of indemnifying.

Article 74 of the Railroad Law of Costa Rica was introduced in evidence. Translated it reads as follows: "In the same case the State may dictate the necessary means to take charge, in whole or in part, of the service of the road."

The plaintiff testified on cross-examination:

"By Mr. Dodge:

Mr. Ryan, you put in a claim against the Government of Costa Rica, didn't you?

The Court: I will save your exception, Mr. Perkins.
Mr. Perkins: Yes.

A. What is that, Mr. Dodge?
X Q. 173. I say you made a claim against the Government of Costa Rica?
A. Why, I suppose you would call it a claim. I don't know just how loosely that was employed.
X Q. 174. Yes, and you have collected $10,000 from the Government of Costa Rica?

Mr. Perkins: For the purpose of the case it may be understood that that amount all told has been paid.
Mr. Dodge: $10,000; yes."

It appeared in evidence that the plaintiff and one Lara, a representative of President Tinoco, had some correspondence after the accident respecting the payment of money to the plaintiff by the Tinoco Government; copies of certain letters between them are annexed hereto and marked "Exhibits C" and "D."

On the arrival of the plaintiff in this country after the accident he was met at the steamer in New York by one Pisa, a representative of Tinoco, and had the following conversation:

"Q. 175. What conversation, if any, did you have with Pisa on that occasion with reference to the payment of any money to you by the Costa Rican Government?

[fol. 69] Mr. Dodge: Well, I understand that may or may not be within his Honor's ruling.

The Court: Yes, I will save your exception, Mr. Dodge, and I think that is all right, so you may answer that, Mr. Ryan.

Q. 176. Just limit, Mr. Ryan, the conversation to that subject.
A. To compensation?

Q. 177. Yes, the payment of any money to you, conversation with reference to the payment of any money to you by the Costa Rican Government, the then government?

A. He said that I would have to have medical treatment and surgical treatment, and that President Tinoco had cabled him to meet the boat, meet me and take me to the best eye surgeon that they could find, and they suggested—he suggested several and he proposed that I go right away, then. * * *

The Court: Yes. What did he say to you about paying you?

The Witness: He said that they wanted to pay everything and—well, that there wasn't to be any reasonable expense spared to get my sight back. That is about what it was.

The Court: They stood ready to pay all reasonable expense?

The Witness: Yes, to get me on my feet again so that I could go on with the Belgian Colony.

Q. 178. Now, you did not at that time go the specialist with him?

A. No, I did not.

Q. 179. Did you then meet him again, or meet any representative of the Tinoco Government?

A. He turned me over then to Mr. Lara, who was the ambassador and who was living in New York, and he said Mr. Lara would take care of all expenses and everything in connection with these operations.

The Court: That is, medical expenses and surgical expenses?

The Witness: Yes.

A. (continued). And as soon as I felt that I could go on with the operations I should come down and they would go with me to any hospital or specialist or anything of that kind. So he left me at the Grand Central Station, put me on the train, and—do you want me to go on, then, how I came to Lara?

Q. 180. Well, did you go to Lara?

A. Yes."

[fol. 70] The plaintiff then testified that he called upon Lara, where the following talk occurred:

"Q. 181. Now, you can tell us what you and Mr. Lara said about their settling the whole or part with you.

Mr. Dodge: That is subject to my exception.

The Court: Yes.

A. Mr. Lara said, 'Now, you must start in at once and get your operations,' and he said that * * * when we got talking it over he said that he had learned, and I had also, that several of the specialists that they referred to, eye doctors, were over in the war, that is, they were taking care of the wounded over there.

The Court: We don't need that, sir; if you will just tell us what the talk was about compensation.

The Witness: That has a connection this way, your Honor, that

he said it would be necessary for me maybe to follow them over there, to go over to one of these specialists, and if that was so he said it would cost a good deal more money, and he said, 'Besides that eye specialist you will need perhaps a nervous specialist in the condition you are in,' and that it might take $25,000, and we left it at that, and he asked me if I would write a letter to President Tinoco after that, after we had settled that way, if it was a settlement. Later, then, when I went to Dr. Fox and Dean Foster—— * * *

Q. 182. Now, did you meet him again?

A. Yes, I met him again.

Q. 183. Where and under what circumstances?

A. I think at his house again.

Q. 184. And what was the conversation then?

Mr. Dodge: That I object to.

The Court: Yes, I will save you on that, Mr. Dodge. * * *

Q. 185. Yes. Anything that was said in the conversation about having looked it over more——

A. Well, that would come up, that we had looked into it and that we didn't think it would require $25,000 to do that, and I voluntarily reduced it to $10,000. I thought $10,000 would cover it as I didn't have to go to Europe for operations, and we left it that way. He asked me——

[fol. 71] Mr. Dodge: Well, now, that comes down to the $10,000, and I submit that that covers your Honor's ruling.

The Court: What was the talk about the $10,000? That is what we want.

The Witness: It was to be paid $500 a month, and I was not to go abroad, but have the operations here in this country. But he said they denied all responsibility for this accident and it was to be not considered as damages, but it was to be considered more as a gift to take care of this immediate necessity of surgical operations and medical attention and nurses, and so forth.

The Court: Who said that?

The Witness: Lara said that.

The Court: What did you say?

The Witness: I agreed to it."

The witness was asked, "What, if anything, was said about any claim against anybody else being reserved to you?"

Over the defendant's objection and exception duly saved, the witness was allowed to answer, and answered as follows:

"A. Lara said: 'Any damages * * * we don't consider this damages,' he says, 'any damages you will have to get out of the Railroad Company.'"

During the existence of the Tinoco Government, payments of five hundred (500) dollars a month were made to the plaintiff, amounting in the aggregate to six thousand (6,000) dollars. After these payments amounting to six thousand (6,000) dollars had been made, the Tinoco Government was overthrown by an insurrection.

Later the subject of the payment of the balance of the ten thousand (10,000) dollars offered by the Tinoco Government was taken up by the plaintiff through the Department of State at Washington.

The plaintiff testified, cross-examination:

"X Q. 186. You were taking it up through our Department of State, weren't you?
A. The last time; yes.
X Q. 187. After the change of government down there, and it [fol. 72] was through our Department of State that the settlement was finally made?
A. Yes, the last $4,000."

An undated letter signed by the plaintiff directed to the Secretary of State at Washington was identified by the witness.

"Mr. Dodge: I offer this.
Mr. Perkins: If your Honor please, this is directed to the Secretary of State of the United States; I don't see how it is competent.
The Court: Well, as I stated to counsel, I am rather inclined to let facts go in here.
Mr. Perkins: Very well.
The Court: And then give you my judgment upon them and put the record in shape so that final judgment on the matter can be taken in the Court of Appeals. I think I will admit the paper."

The letter was introduced in evidence, and a copy is hereto annexed marked "A." A certified document in Spanish and its translation were introduced in evidence over the plaintiff's objection and exception. A copy of the translation is hereto annexed and marked "Ba" and may be accepted as an authentic translation of the document of which the certified Spanish document was a copy.

Professor POUND testified that under the law of Costa Rica the terms "tort" and "tort feasor" did not exist, but that the term "delict" was applied to acts of a tortious character.
Article 15 of the Code was put in evidence. Translated it reads:

"The existence of * * * moral persons (corporations) as they are usually called, proceeds from the law, except that of the state, which of full right is a perpetual moral person."

Professor POUND added:

"That is, all corporations, as we should say, have their existence from the law, except the state itself, which is in perpetuity a moral person."
"The liability under Section 1048 is what the civilian calls a solidary liability. That is, Section 1048 provides that the carrier [fol. 73] should be liable solidariment, a solidary liability, substantially what we call joint and several; not joint, that would be correal, but several; so joint and several would very nearly come to it."

In Costa Rica you have to distinguish between different kinds of liability. In a correal liability a discharge of one correal debtor discharges all the others.

Article 642 of the code was put in evidence. This provides regarding the effect of the release of one solidary debtor upon the discharge of others. A creditor means a person who can exact, a debtor one from whom an exaction can be made. The terms are much broader than in our law, not restricted to money claims as with us. In the case of two solidary debtors, if there has been a release of one debtor by the creditor, then the creditor can recover one-half of the total claim from the other solidary debtor, if the creditor at the time he makes the release has reserved his right against the latter. If there is no reservation it is a full discharge of both debtors.

Regarding the suability of the state in Costa Rica the witness testified on redirect examination:

"The decisions that I looked at in Costa Rica seemed to go on the basis of a general provision of the constitution as to the equity of men and the provision about the state being a moral person, and those decisions indicate, in fact they establish, a suability of the state for wrongs generally as far as I can see, as far as their language goes, and certainly under Chapter 1048 of the Code of Costa Rica where applicable * * * This judgment obtained against a state is certainly on the same footing, to use an analogy, according to our law, as a judgment from the Court of Claims. * * * The proceedings are ordinary civil proceedings, but the best analogy that I can give you to the nature of the transaction would be the Court of Claims, because the judgment isn't enforceable by execution or by ordinary process, but the judgment is exactly on the same basis."

"The Court: That is what I was going to ask you.

Q. 14. That is what I was going to ask you. Is there any way to enforce the judgment against the state?

[fol. 74] A. Well, the same way in which a judgment of the Court of Claims can be enforced, or not the same way, but analogous. It is analogous by the Government appropriating to pay the judgments which are rendered against it. In that way the courts have no control over the revenues and no execution is possible."

On recross-examination the witness testified substantially as follows:

Joint debtors are something like correal, but not exactly. Joint and several debtors are something like solidary debtors, but not exactly. In the obligation in solidum, the solidary obligation among themselves, they are liable for their share, but the creditor, the claimant, can pursue any one of them for the whole. So when you have an obligation in solidum, you have an obligation in which you can exact the whole from any one of them, but among themselves there is to be a liability according to their shares.

Section 1048 provides for solitary liability, "and I should not have

any doubt that between individuals, individual wrongdoers who are liable in solidarity under that section, that Article 642 would apply." I cannot state whether the rule would be the same if the state were a debtor. I do not know that it can be answered until it has been settled in different jurisdictions. Section 642 is applicable to all solidary obligations except for this possible difficulty due to the presence of the state. It is applicable to tort as well as contract. It reads:

"The release of one of the debtors frees the rest except when the creditor reserves his rights against them, and in that case there shall be deducted from the debt the part of the debtor who has been released."

It is a matter of intention whether the creditor has reserved his rights inasmuch as the word "express" is not used in connection with the reservation. I base this on the provisions of the French Code and other civil codes, some of which have the word "express" and some do not.

"Q. 15. But the intention must show itself, as the code says?
A. In the transaction.
[fol. 75] Q. 16. That is, the code reads 'remission given to one of the debtors relieves the other unless there is a reservation against him?
A. Unless the creditor reserves his right against them."

"The Court: That is a reservation in fact.

A. Well, to use civilian language, it must be tacit or expressed. Tacit is very nearly what we mean by implied."

Article 756 of the Civil Code of Costa Rica was introduced in evidence. Translated it reads as follows:

"When a juridical act (any act which gives rise to legal obligations or legal relationships between parties) is made to appear in a public or private document, no proof of witnesses will be received contradictory to or outside of what is contained in such document, whether relative to what may be alleged was said before, at the time of or after its execution, although the matter treated of be less than two hundred fifty colones in value."

Article 757 of the Civil Code of Costa Rica was introduced in evidence. Translated it reads as follows:

"However, or without doubt, testimonial proof is admissible to prove juridic acts whose object exceeds in value two hundred fifty colones (a colone is about twenty-two American cents) and to prove contracts or conventions which have been made between parties, first, when there exists the beginning of proof by writing; second, when it has been impossible to him who invokes the testimony to procure a literal copy, or when on account of an unfor-see-able event it has been lost that which has been obtained."

The foregoing was all the evidence that is material to the questions involved in this bill of exceptions.

At the close of the evidence the defendant moved that the court direct the jury to return a verdict for the defendant, which the court denied, stating:

"The Court: What I wanted to hear argument about was upon the point whether the case was clear enough for the defendants so that I should depart from the usual custom which I have here of [fol. 76] sending the case to a jury and taking an alternative verdict, and sending it up in that way. While I think it is pretty doubtful whether there is any evidence of negligence, I don't think it is so clear that there is not, that in a case that has been so expensive to try as this I shall direct a verdict now. I shall let the case go to the jury and take special findings, and if they find for the plaintiff take an alternative verdict for the defendant so that the final judgment can be entered in the Court of Appeals.

Mr. Dodge: Now, with regard to some of the other questions, I take that in accordance with the plaintiff's specifications I may argue to the jury that the plaintiff cannot recover unless, in the first instance, the defendant knew that the attacking troops had reasonable cause to believe that the train upon which the plaintiff was a passenger was transporting armed enemy forces.

The Court: That is the whole basis of the plaintiff's case. I should think that the situation was such that the military authorities or the Government did have reasonable ground to suppose that enemy forces might be found on that train and might take steps against them; and therefore that precautions were required in advancing the passenger train. That is your case?

Mr. Perkins: That is my case. If that isn't sustained, I have none."

Defendant's Requested Instructions to Jury

The defendant's counsel then presented certain requests for rulings, including the following:

"1. On all the evidence your verdict must be for the defendant."

"6. There is no evidence that the defendant's officers and agents ought to have anticipated that the Government troops would believe that there were rebels on the passenger train."

"9. There is no evidence that the defendant knew that the Government troops had reasonable cause to believe that armed insurrectionists were on the train on which plaintiff was a passenger."

"11. The effect of the release given the Government is to be determined by the law of this jurisdiction.

[fol. 77] "12. The effect of the accord and satisfaction with the Government of Costa Rica is to be determined by the law of the District of Columbia where it became complete.

"13. The settlement made by the plaintiff with the Government of Costa Rica is a bar to this action.

"14. (If the law of Costa Rica is held to govern.) As the arrangement by which the Government of Costa Rica was discharged from any further liability was put in writing it cannot be shown by parole that there was any reservation of rights as against this defendant."

COLLOQUY BETWEEN COURT AND COUNSEL

Before the case was sent to the jury the following discussion between the court and counsel occurred:

"The Court: I may put a special issue there; I am inclined, as I said, to take the view that you can't apply the rule about solidary debtors to the government because the government is not, strictly speaking, a debtor. You can't collect from it except by grace, and therefore it isn't fair to apply to it a rule which applies to a person against whom you have got a real right of action, and so I am inclined to cut under the whole thing. Maybe I am wrong about it, so in that case I am inclined to instruct the jury to report whether they find that he reserved his right against the railroad when he settled with Costa Rica.

Mr. Dodge: Your Honor need not bother the jury with that question, because I don't question his testimony that there was a tacit understanding, not expressed, however, in the final agreement as made. I contend that it had no legal effect, but I do not question, and I am willing to concede for the purposes of this case, that the jury would find that there was intended to be a tacit reservation of the right against this defendant, an intention expressed in conversation before the documents were executed.

The Court: Yes, that is what I should say.

Mr. Dodge: I will agree that for the purposes of this case the jury would find that.

The Court: Then you don't need to complicate the case, do you, by an issue of that sort, because if the Court of Appeals should say that [fol. 78] the principle applies of a proportional discharge, it would simply mean a reduction to one-half of whatever damages, if any, you might recover.

Mr. Perkins: Wouldn't it be well to have those figures appear in the verdict?

Mr. Perkins: I should like to put this case in such shape that you can get final judgment on it in the Court of Appeals, and if you will sketch out some issues that may tend to settle the facts, I will send it up that way. Well, the eighth, not exactly in that form. I regard the operation of the trains on the evidence as having been sufficiently under the control of the railroad so that they were bound to run them carefully. They were doing the operating. The ninth is true."

Charge to Jury

The court then charged the jury as follows:

"Mr. Foreman and Gentlemen: This is an action in which Mr. Ryan is seeking to recover damages from the Northern Railway of Costa Rica because of certain injuries which he sustained while he was a passenger in one of their cars in February, 1918.

He says that he was hurt by reason of fault on the part of the railroad company. The mere fact that he was injured by being shot while he was a passenger in one of their cars does not entitle him to damage. The gist of his case is the proof of fault which occasioned his injury on the part of the railroad company defending here, and it is necessary, in order for him to recover, that he establish that fault to you by what is called a fair preponderance of the testimony.

Some of you have been trying here criminal cases in which guilt has to be brought home beyond a reasonable doubt. No such high degree of proof is required in civil proceedings. If I make a claim against you, Mr. Foreman, on facts which are disputed, but, if proved, entitle me to judgment, it is sufficient if I establish that it is distinctly probable that my side of the story is true. A good deal of doubt, you see, may still be left. A jury may feel that they cannot be any way certain about what the fact was or about whether fault is shown, and yet, if it seems to them distinctly more probable that the facts are such as to entitle the plaintiff to a judgment or to war-[fol. 79] rant an opinion of fault, then the burden of proof has been sustained. If not, if the proof does not carry your minds to that point, the defendant is entitled to a verdict. Of course the law means exactly what it says. You are not to say no burden of proof exists here. 'Distinctly more probable' means just what it says, that while doubt may still remain, the probabilities must be distinctly with the plaintiff in order to entitle him to a verdict.

The case is an unusual, and I think you have found it rather an interesting, one. The facts really are not much in dispute. When we think over the testimony of the witnesses for the plaintiff and the witnesses for the defendant, there are not many points, nor very important points, on which they disagree. Ryan took this train from San Jose to go down to Port Limon, where he was going to take the steamer. A lot of other passengers took the train too. Apparently at that time nobody had any idea that this insurrection, which had sprung up in the western part of the country towards the Pacific, had extended towards the Atlantic seaboard, or the Gulf seaboard. After the train had been two or three hours,—three or four hours perhaps,—out of San Jose, it was captured by this band of revolutionists. They treated the passengers well enough. They used the engine to destroy the track towards San Jose over which the train had come. They said that they would let the train go on if another engine were furnished by the railroad company, and that request was communicated to the railroad company at Port Limon.

A message was attempted to be sent through the railroad com-

pany to the American Consul; and the railroad company said they couldn't allow the train dispatcher's line to be used for that purpose. Whether it was a wise decision or not—and it would seem that the message might have been put through if they had wanted to—I do not see that it has anything to do with the matter that you are trying here. It has no relation at all to the occurrence at La Pascua. You may consider it as one of the facts in the case, but I see no connection between it and the shooting at all.

The condition of the train, the fact of its capture, was communicated to the railroad authorities at Port Limon within fifteen [fol. 80] minutes or perhaps half an hour after it occurred, certainly by two o'clock, and probably between twelve and one they were advised of the occurrence.

The government down there was promptly advised. Pretty obviously steps were at once taken to forward troops up the line. The railroad people seem to have gone to their offices and been quite active; and the superintendent's office of the railroad seems to have been quite active in watching what was going on. The manager, Chittenden, was there. Marsh, who had general oversight as superintendent of the road, and one dispatcher at all times appear to have been there. The American Consul was in and out; and generally there seems to have been a good deal of watchfulness and activity on the part of the government officials and railroad officials at Port Limon.

Somewhere about three or half past three a troop train started out from Port Limon to go forward and meet this band of insurrectos, and it was that train which did the shooting. An hour or two later, perhaps at half past five or something of that sort,—the time seems to be relatively unimportant—the rebels finally released this passenger train on which Ryan was, and that train continued on, down towards the coast. At various points that train was in touch with the railroad officials at Port Limon; and of course the troop train also was in touch with them; and it was perfectly possible to give information to the troop train as to what the conditions were on the passenger train, and vice versa.

When the passenger train reached this little station just this side of Peralta, I think—or when it reached Peralta,—if I remember the testimony rightly, the passenger train received a pass-order to pass the on-coming special which contained the troops at La Pascua; and a similar order was transmitted to the troop train when it was at Las Lomas. So that at that point it was quite possible to have communicated to the train anything which ought to have been communicated to it about the other train.

After leaving Las Lomas and Peralta, which apparently both trains did at about the same time, judging from their arrival at La Pascua, both trains proceeded to that point. The passenger train [fol. 81] arrived there first and pulled on to the siding at the right. The troop train came in four or five or six minutes later and stopped just before the siding. At that point the conductor, Ramsay, of the passenger train met the conductor of the troop train and told him that he had no rebels on his train. Veitch, a passenger, also was around there during that talk, either taking part in it or standing

by. He heard that. And then two officers got off of the troop train and Ramsay and Veitch told them that there were no revolutionists on the passenger train, and that it was a down passenger train. Just what form that talk took is not agreed to by the parties. The plaintiff puts it to you that the information given to the officers by Veitch or Ramsay, or both, was not readily accepted by them; that one or both of them was heard to repeat somewhat emphatically to the officer, 'I tell you, man, that there are no revolutionaries on the train', which would seem to indicate that his statement to that effect had been received with distrust. The evidence, however, of Veitch and Ramsay perhaps gives it a somewhat different color, that they simply told these officers that it was a passenger train and that there were no revolutionaries on it. What took place there is of course for you to reconstruct, and it may be a matter of some importance.

I have told you before that the facts are entirely for you to settle. You will take what I tell you about the law; but the facts it is your responsibility to get correct, and you are always at liberty to disregard whatever I say to you about the facts.

Then, after this exchange of talk between the officers and Ramsay and Veitch, the passenger train started to move forward. The officer said it was to stop, and it was stopped by Ramsay on the officer's command. The troop train then got under way and moved forward, and as it went forward, as its cars—there were, as I remember, two cars full of soldiers—as those were ranging opposite the passenger cars one of the officers or the ground seems to have given the order to fire. Then there was a volley and perhaps a good deal of other shooting right across the two or three feet between the two [fol. 82] trains and into these passenger cars where the passengers were sitting, including the women and children—persons who were quite inoffensive.

At that same time, when the shooting started, Veitch says that somebody shot at him. He says they shot not once, but several times, that a bullet cut across the seat of his trousers, another bullet went through his coat, another bullet struck a bag that he had in his hand, and another bullet went through his valise. He escaped by getting under the train. Ramsay says they shot at him,—a rather difficult thing to explain, because they could hardly have supposed that Veitch and Ramsay, certainly Ramsay, were revolutionaries. Unless we are to reject that statement, there appears to be good reason for saying that a very cold-blooded effort was made to kill Veitch and Ramsay. The train man—the mail man in the passenger train—appears to have been shot down at a point blank range right across two or three feet between the trains, a man that, again, it is very hard to conceive anybody could have supposed that he was a revolutionary.

At the same time we are to remember that this was an armed force mobilized and proceeding into contact with the enemy; that at this time it was about 12 or 15 miles, not more than that, from where the enemy were known to be assembled; that this train had come forward only that distance from where the enemy were in some force, and that it was obviously a situation in which there could not fail

to be a good deal of tension and anxiety on the part of the officers who were in charge of that movement, a very nerve-wracking time and a very critical time when they are approaching as closely as that and had not yet made their first contact with the enemy; and in that situation they met this train coming down from this close-at-hand camp of the enemy.

In the course of that shooting, as of course you know, Ryan was very badly hurt; there is no question whatever about that, and a number of people were killed. They counted up four or five men, I think, who were shot and killed, a woman or two, or perhaps three women, and a good many other people injured. It was a slaughter of the passengers, no doubt about that.

Now, the question is whether the railroad is responsible. That is [fol. 83] the assertion which Mr. Ryan makes, that it was at fault, and, as I have told you, it is upon his proof of that assertion, or a fair preponderance of the testimony, that his right to recover depends. When we speak of a passenger's action against a railroad for injuries, we usually think of a train accident or a derailment, or a failure of the mechanism, or perhaps that he was assaulted by one of the train crew, or something of that sort. But nothing of that sort occurred here. The railroad company obviously had no control over the Government troops and no ability to protect its passengers against action by the armed forces of the Government. When you go in a train, Mr. Foreman, as a passenger, the railroad does undertake a certain obligation to protect you against assault by persons who, without right, go into its cars and raise a rumpus. But this railroad could not be expected, nor any railroad, to protect its passengers against the armed forces of the Government under which it was operating.

What, then, is the ground of liability? It is this: The plaintiff says that the Government troops coming forward in the train from Limon, had reasonable cause to believe that insurrectos or rebels, or revolutionaries, whichever is the proper term, were on the passenger train, and that the defendant railroad company knew that the Government had reasonable cause to believe that. Let me restate that, because, although it has been put to you, it is rather a tricky thing to carry absolutely in mind, and I am going to invert the statements put to you by counsel in order to put it in another way.

The plaintiff's position is that the Government's troops and their officers had reasonable ground to believe that revolutionaries were on this train. That is the first thing, and that relates to what the officers in command of the troops and the people back of them had ground to believe, that there were revolutionaries on this train. And the second point in the plaintiff's major proposition is that the Northern Railway Company officials knew that the men in charge of the troops had ground for that belief. That puts the case, then, in this situation. Here is a railroad company moving troops towards a [fol. 84] hostile area out of which a passenger train is coming. Its officials know that the men in charge of the troop train have reason to believe that on the passenger train, which is being brought out by the railroad company, revolutionaries are riding. If you were a

railroad official, Mr. Foreman, managing a railroad, bringing out a passenger train which was from one hostile area towards another area, the opposite area, and if you knew that troops were advancing towards the opposite area and that your train coming from that area would have to pass through those troops, and that the troops would believe that there were revolutionaries or enemies to them on the train, it is obvious you would have to make that movement with the greatest of precautions. It would be, to compare a small thing to a great one, like passing a train across between the German and the Allied lines during the Great War. It would be a movement out of one hostile zone into the opposite hostile zone, something which obviously could not be done except with the very greatest precaution. But that depends, you see, on whether the officers of the railroad knew that the officers in charge of the troops believed, or might well believe, that revolutionaries were coming forward on the passenger trains. And it is upon that point that the real issue of the case comes as I understand the arguments of counsel.

It is a pure question of fact calling for your judgment upon it, and for your judgment also as to whether the conduct of the railroad was adequate in the premises.

The railroad says that it had no belief that the officers of the troops supposed that any revolutionaries would be on that train. They had no ground to think so, the railroad says. There were, in fact, no revolutionaries; there was no reason for the officers to believe that they were there; we had no idea that they did believe it; and therefore we were not bound to act on the assumption that they believed it. That is the railroad's case. They say that they had kept the Governor of the province carefully informed of everything that was being done. They say that they notified the troop train. Dingledine says that the troop train was supposedly notified that there were no revolutionaries on this train. That testimony is not accepted by the plaintiff, and you may reject it, if [fol. 85] you see fit; but that is what Dingledine said. And then it is said by the railroad that on the undisputed testimony Ramsay and Veitch went forward and told these officers what the fact was, and the officers simply did not believe them.

Now, they say, we have told the Governor, who was in overcommand of the troops, we have notified the train as it was on its way; we have given them notice right there at the spot; we are not insurers; all we are to be held to is the care of a reasonably prudent and careful man; we are not to judge by hind-sight; that is not the way to judge us,—and that is quite right, is it not; we are to be judged by what reasonable prudence required before this thing occurred, while the trains were still apart there. And they say, looked at fairly, hadn't we at that time done everything that a reasonably prudent and careful man would think the circumstances required, and isn't this occurrence really a piece of the grossest cruelty, and unreasonable and unexpected cruelty, that nobody ought to be held to have anticipated? That is the railroad's position.

But the plaintiff says, as I put to you, that there was something in the mind of these troops and officers when they fired. It cannot be supposed, says the plaintiff, that these officers simply started out to murder a lot of people in cold blood by turning on them the rifles of an armed military force. We are bound to believe that the officers did think that that train had danger to their force in it, and on that account gave the order to fire; and they say that the attack took place because sufficient precautions had not been taken through government channels, or in some other way, to assure them that the train coming down was a harmless train.

Those are the two sides of the case, and you are to decide whether you think fault on the part of the railroad company has been made out by a fair preponderance of the testimony.

Something has been put in about a settlement between Ryan and the Costa Rican Government, and I instruct you upon that point in this way: In view of the defendant's agreement that in his settle-[fol. 86] ment with the Costa Rican Government Ryan in fact reserved his rights against other persons, I instruct you that if the Costa Rican law is as stated by Professor Pound, the evidence does not show any settlement or release by Ryan which bars the present action. If you accept Professor Pound's statement of Costa Rican law, which is for you to say (you have the right to reject it if you see fit, but I assume that you will not), accepting Professor Pound's statement of Costa Rican law, then the settlement between Ryan and the Costa Rican Government does not bar his action here."

COLLOQUY BETWEEN COURT AND COUNSEL

The following conference occurred with the Court after the close of the charge:

"Mr. Perkins: I told the jury that they might take into consideration as an allowance such part of the $10,000 as they thought was fairly——

The Court: The present value of the $10,000?

Mr. Perkins: Yes, and I think it would be well, would it not, to have the jury report how much they find, because it would have some bearing upon the division of this verdict in case it should be found that the Costa Rican Government was a tort-feasor? It would be divided, don't you see?

The Court: I don't quite follow you. Divided in two?

Mr. Perkins: Yes, but I wouldn't want to divide it in two after we had taken out the $10,000, if you please, provided they had taken $10,000. So I thought it would be well to have them answer the question, how much, if anything, they had allowed on account of this $10,000."

"The Court: Why don't you say $10,000, Mr. Perkins? The difference can't be very great, and he had the use of the money.

Mr. Perkins: Very well, I will." * * *

"The Court: Mr. Foreman and Gentlemen, Mr. Perkins, counsel for the plaintiff agrees that if you come to the question of damages you may deduct $10,000 from any award that you think Ryan entitled to. So that when you return your verdict we will understand, Mr. Foreman, that you have deducted $10,000, if you find for the plaintiff, from the verdict which you otherwise would have returned. Do you understand?"

[fol. 87] The following inquiry and talk also occurred before the jury retired:

"The Foreman: Your Honor, can a question be asked by the jury?

The Court: Yes, indeed.

The Foreman: Is there any thought to be given by the jury as to the question whether the Government owned that railroad during the time after they had left Peralta, or whether the railroad owned it.

The Court: No. The operating was in charge of the Railroad Company on all the evidence before you.

Mr. Dodge. The direction had been taken over by the Government.

Mr. Perkins: Not the operation.

Mr. Dodge. No; the details of the operation of the train.

The Court: The Government, gentlemen, had taken over the general control of the railroad at that time, but the actual operation of the trains was still in charge of the Railroad Company, as I understand the evidence."

Defendants Exceptions to Instructions to Jury

The defendant then duly excepted to the refusal of the court to grant its several requests hereinbefore set forth and numbered 1, 6, 9, 11, 12, 13 and 14.

The defendant's counsel also made the following statement in excepting to a portion of the charge to the jury:

"And to that portion of the charge in which your Honor instructed the jury that if they accepted Professor Pound's law, the release is not a bar, my contention being that under the provision of the written code put in evidence this morning the construction of the Costa Rican law is a question for your Honor, and that shows that Pound's general statement as to what the civil law generally was is not applicable in Costa Rica. I also except to your Honor's authorizing the jury to find full damages for the plaintiff, less $10,000 that is conceded, on my contention that under the provision of the written law of Costa Rica the plaintiff would be entitled only to half damages."

The Court then stated to the jury:

[fol. 88] INSTRUCTIONS TO JURY

"Gentlemen, counsel are afraid I did not make quite clear to you what is meant by fair preponderance of the evidence. I said to you it must appear distinctly more probable that the plaintiff is right than the contrary in order to entitle the plaintiff to a verdict. I mean, of course, that the evidence must make it appear distinctly more probable. You are not to simply speculate or guess, but, balancing up the evidence, the evidence must sensibly incline your minds to the view that the plaintiff has the right side of the controversy."

The jury made special findings, a copy of which are hereto annexed and marked "G," and returned a verdict for the plaintiff in the sum of twenty-five thousand (25,000) dollars, and an alternative verdict for the defendant, a copy of which is hereto annexed and marked "E."

MOTION TO SET ASIDE VERDICT AND TO ENTER ALTERNATIVE VERDICT AND ORDER THEREON—Filed May 5, 1923

"The defendant moves that the verdict of the jury for the plaintiff be set aside as not warranted in law and that the alternative verdict for the defendant be entered in place thereof."

It was argued by counsel on the twenty-fifth day of June, 1923. The motion was granted by the court, on the sixth day of September, 1923, making the following order:

"An order may be entered setting aside the verdict for the plaintiff as not warranted in law and entering the alternative verdict for the defendant,"

and filing the memorandum thereon hereto annexed and marked "Exhibit F."

The plaintiff duly excepted to the order and ruling of the court on the motion to set aside the verdict, and prays that his exception may be allowed.

After the verdict of May 3, 1923, the defendant in due course filed a bill of exceptions, but in view of the order later made setting aside the verdict for the plaintiff and entering a verdict for the defendant, no action has been taken with regard to this bill of except-
[fol. 89] tions. The exceptions upon which said bill is based are all stated in the plaintiff's bill of exceptions.

Charles F. Perkins, Paul F. Perkins, Attorneys for the Plaintiff.

Order Settling Bill of Exceptions

Th foregoing bill of exceptions is allowed.

James M. Morton, Jr., U. S. D. J.

In United States District Court

Defendant's Exhibit A in Evidence

The Honorable the Secretary of State, Department of State, Washington, D. C.:

Sir: I hereby accept the offer made by the Costa Rican Government to pay me the remainder of the original sum of $10,000 in settlement of my claim against it for physical injuries inflicted upon me by Costa Rican troops which has resulted in loss of sight, which injury is made the subject of despatch No. 202, September 26, 1921, issued by the Minister for Foreign Affairs of the Republic of Costa Rica, No. 301-B, addressed to the Hon. Walter O. Thurston, Charge d'Affaires of the United States at San Jose, Costa Rica—said despatch constituting the offer of settlement hereinbefore alluded to. It is understood that the terms of said offer are that I be paid the unpaid remainder of said sum of $10,000, namely $4,000 United States currency, which is to be paid in gold and in installments of $500 a month for successive months until the whole amount of $4,000 has been paid.

You are respectfully informed that in order to facilitate payment by the Costa Rican Government, I have designated as the persons authorized to receive such payments in Washington, my Washington representatives, Mr. Clement L. Bouve and Mr. A. Warner Parker, members of the law firm of Bouve and Parker, of Washington, D. C., under power of appointment issued under power of attorney duly executed by me in favor of Charles F. Perkins, Esq., of Boston, Mass., under which power of appointment either Mr. [fol. 90] Bouve or Mr. Parker, or both, is and are authorized to accept such payments.

It is requested that remittances from the Government of Costa Rica be drawn in favor of Bouve and Parker, Washington, D. C.

It is understood that the first payment of the successive monthly installments of $500 American gold will be due and payable on the receipt by the Costa Rican Government of this acceptance and ratification of the offer of that Government above described.

I have, Sir, the honor to be, your obedient servant,

Michael Bartholomew Ryan.

In United States District Court

Defendant's Exhibit Ba in Evidence

Stamp Paper No. 342,880

Miguel Obregon Lizano, Secretary of State in charge of the Department of Foreign Relations of the Republic of C. R. certifies:

That in the copy book containing correspondence addressed to Foreign Legations accredited to Costa Rica, on page twenty it is found the note which says:

"Republic of Costa Rica Department of Foreign Relations. No. 301, B. San Jose, September 26th, 1921. Chargee d'Affaires. I have the honor to acknowledge receipt of the kind note of Your Excellency dated the 20th instant, and which on referring to recent conversations, confirms that which is related to the case of Mr. Miguel Bartolome Ryan. This citizen was a victim of the regrettable incident occurred at the station in Pascua, of the Atlantic Railway, whereby the Government troops of Costa Rica made an insenate discharge on the passengers of the train and a bullet caused to the said gentleman a total injury in one eye and the posible loss of the eyesight. The Government of Tinoco, owing to the fact that this occurred in February, 1918, after some private negotiations to avoid a claim by the diplomatic channels, compromised to recognize as indemnization the sum of ten thousands dollars, of which $6,000 was paid; and Your Excellency now [fol. 91] asks if taking into consideration the circumstances of the case, whether the Government is disposed to pay the balance which is indebted, in accordance with the preceding compromise. As Your Excellency actually knows the legal situation created by the acts and decrees of the Tinoco Administration, it is unnecessary to state that the agreement entered into with Mr. Ryan has no legal standing and therefrom it is derived from the fact that we cannot recognize proceeds for the sum unpaid. However, my Government being inspired of equitable sentiments and desirous of showing with facts the good will towards the American citizens in general and specially to one who by the impolicy of the Costa Rican Troops was injured, such as losing the eyesight, is willing to pay to Mr. Ryan the sum of four thousand American gold, on successive monthly installments of 500 dollars, to commence on the date of the first payment. Therefore, Your Excellency, is hereby authorized to communicate the interested party of the preceding resolution, with the object to obtain the ratification of that arrangement, and I avail myself of the opportunity to reiterate to you the protests of my most distinguished consideration.

Alejandro Alvarado Quiros.

To his Excellency Walter C. Thurston, Chargee d'Affaires ad interim of the United States of America, San Jose.

It is in conformity.

Given in the city of San Jose, on the twenty-eighth day of February, nineteen hundred and twenty-three, at the request of Attorney Porfirio Gongora, in his capacity of Attorney for the Northern Railway Company. It is affixed and cancelled a revenue stamp for value of one colon.

M. OBregon L.

Republic of Costa Rica,
City of San Jose,
American Consulate, ss:

I, Henry S. Waterman, Counsel of the United States of America at San Jose, Costa Rica, duly commissioned and qualified, do hereby certify that Miguel Obregon L., whose true signature and official seal are, respectively, subscribed and affixed to the foregoing docu- [fol. 92] ment, was, on the 28th day of February, 1923, the day of the date thereof, Secretary of State in charge of the Department of Foreign Affairs of the Republic of Costa Rica, duly commissioned and qualified, to whose official acts faith and credit are due.

In witness whereof I have set my hand and official seal this first day of March, 1923.

Henry S. Waterman, Consul of the United States of America.
Service No. 99.

In United States District Court

Defendant's Exhibit C in Evidence

Hotel Ansonia, New York, August 11, 1918.

Mr. M. B. Byan, R. F. D. No. 42, Milford, Conn.

My Dear Mr. Ryan: The Government of Costa Rica presided over by Mr. Federico Tinoco does not in the slightest degree make itself responsible for the accident that happened to you in the revolutionary emergency that took place during March last, since that responsibility rests only on those who meant to revolt the country at large, but Mr. Tinoco who deeply deplores and sympathizes with your bereavement has instructed me to arrange with you the manner to indemniside you for the damage done, and therefore as per our verbal agreement of yesterday the Government of Costa Rica will pay you ten thousand dollars as follows: five hundred dollars monthly from the first day of September next.

Another reason that has moved Mr. Tinoco to cause this settlement is the friendly way you have asked for reparation.

I am yours very truly,

Carlos Lara.

IN UNITED STATES DISTRICT COURT

DEFENDANT'S EXHIBIT D

August 13th, 1918.

Mr. Carlos Lara, Hotel Ansonia, New York City.

MY DEAR MR. LARA: I beg to acknowledge receipt of your letter of the 11th instant, and I wish to say that the terms outlined [fol. 93] therein are as we arranged in our interview, only, that I understood that after December it was to be $1,000 a month, but if you arrange for a certain payment of ($500) five hundred dollars the first of each month, at the National City Bank, as you spoke of, it will be agreeable to me, until the sum of ($10,000) ten thousand dollars has been paid. This sum pays the claim in full.

I appreciate the difficulties under which both the President and the country of Costa Rica are laboring at this time, and therefore agree to your terms, in order to ease matters as much as possible for President Tinoco.

I am writing the President by next mail.

Yours very truly, —— ——.

[Memorandum.—Copies of alternative verdict, marked "E," memorandum of decision on motion to set aside verdict, marked "F," and special findings, marked "G," referred to in the foregoing plaintiff's substitute bill of exceptions as annexed, are here omitted as they appear elsewhere in this Transcript of Record. James S. Allen, Clerk.]

IN UNITED STATES DISTRICT COURT

MOTION TO AMEND BILL OF EXCEPTIONS AND ORDER ALLOWING SAME—Filed September 10, 1922

Now comes the plaintiff and moves to amend his bill of exceptions by adding at the end of the direct examination of the witness Arthur E. Nicholson, on page 4, the following:

"Q. 1. Do you know whether or not the United Fruit Company is in fact operating railroads in any part of the United States or in Costa Rica?

A. They are not operating any railroads in United States or Costa Rica.

Q. 2. At the present time?

A. At the present time.

Q. 3. Were they in 1918 operating any railroads?

A. Not in United States or Costa Rica.

By His Attorney, Charles F. Perkins.

[fol. 94] Allowed September 15, 1922. J. M. M., Jr., D. J.

May be allowed. R. G. Dodge, Defendant's Attorney.

IN UNITED STATES DISTRICT COURT

Bill of Exceptions—Filed June 26, 1922; allowed September 15, 1922

CAPTION

This is an action of tort to recover damages for personal injuries received by the plaintiff while a passenger on a railway train bound from San Jose to Port Limon, Costa Rica, over a line of railway which the declaration alleges was operated by the defendants jointly.

It was admitted by the defendants that the defendant Northern Railway Company was operating said line of railway at the time the plaintiff received the said injuries. The charter of the defendant United Fruit Company was offered in evidence by the plaintiff and contains the following provision:

Page 2 (c):

"And to construct, maintain and operate railroads wholly in foreign countries and territories and states other than the State of New Jersey."

It appeared in evidence that the defendant United Fruit Company was the beneficial owner of all the shares of capital stock of the defendant Northern Railway Company, and that all the officers of said defendant railway company were officers of the defendant United Fruit Company.

The assistant treasurer of the defendant United Fruit Company was called as a witness for the plaintiff, and testified as follows:

"Q. 1. You full name is what?

A. Arthur E. Nicholson.

Q. 2. What is your occupation?

A. Assistant treasurer of the United Fruit Company.

Q. 3. How long have you been in that office?

A. About one year in that office.

[fol. 95] Q. 4. How long have you been in the employ of the United Fruit Company?

A. Seventeen years.

Q. 5. In what capacity, prior to the time that you were elected assistant or appointed assistant treasurer, did you act for the company?

A. I was appointed assistant secretary about three years ago, and prior to that time I was clerk and stenographer for years—had various positions as clerk.

Q. 6. Were you also, Mr. Nicholson, assistant treasurer of the Northern Railway Company?

A. Yes.

Q. 9. Assistant treasurer of both the United Fruit Company and the Northern Railway Company?

A. Yes.

Q. 8. With the office of each company in identically the same place?

A. No, sir; my offices for both companies were at 131 State Street, Boston.

Q. 9. Your office as assistant treasurer—do you have more than one office as assistant treasurer?

A. One room.

Q. 10. One room for both the Northern Railway and the United Fruit?

A. Yes.

Q. 11. Can you give me the list of officers of the Northern Railway Company as of February, 1918?

A. Yes.

Q. 12. Can you give them without reference to some memorandum?

A. I think I can, sir.

Q. 13. Please state the names of the officers of the Northern Railway Company.

A. 1918?

Q. 14. Yes.

A. President, Henry C. Keith; first vice-president, Andrew W. Preston——

Q. 15. Are these the officers of the United Fruit or the Northern Railway?

A. The Northern Railway.

Q. 16. Yes.

A. President, Henry C. Keith; first vice-president, Andrew W. Preston; second vice-president, Francis R. Hart; secretary, James F. Tilden; assistant secretary, Eugene W. Ong; treasurer, John W. Damon; assistant treasurer, Henry M. Sawyer; auditor, James F. Tilden; assistant auditor, Cecil H. Taylor; directors, Victor M. Cutter, Francis R. Hart, Henry C. Keith, Kenneth K. McLaren, Eugene W. Ong, Bradley W. Palmer, Andrew W. Preston.

[fol. 96] Q. 17. Mr. Nicholson, were they all officers of the United Fruit Company?

A. They were at that time.

Q. 18. Is the treasurer of the United Fruit Company and the Northern Railway Company the same man?

A. Yes.

Q. 19. The president of the United Fruit Company is the vice-president of the Northern Railway Company?

A. He was; yes.

Q. 20. At that time?

A. Yes.

Q. 21. And the president of the Northern Railway Company was the vice-president of the United Fruit Company?

A. He was at that time.

Q. 22. And the directors of the Northern Railway Company were all directors in the United Fruit Company, or were at that time?

A. Yes, they were at that time.

Q. 23. Do you know whether the capital stock of the Northern Railway Company is owned by the United Fruit Company?

A. The stock of the Northern Railway Company is held by trustees in their name.

Q. 24. For the benefit of whom?

A. Under a lease between the Costa Rican Railway and the Northern Railway,—it is for the benefit of the Costa Rican Railway Company.

Q. 25. It is for the benefit of whom?

A. Presumably for the United Fruit Company.

Q. 26. Isn't it a fact that the United Fruit Company is the beneficial owner of the stock of the Northern Railway Company subject to the obligation to pay rent to the Costa Rican Railway?

A. Yes.

Q. 27. In 1918, in February, did the United Fruit Company furnish money for the operation of the Northern Railway Company either by loaning or otherwise?

A. It made some purchases of materials for their account,—rather, paid some of their bills.

Q. 28. Did it loan any money to them beyond that?

A Not to my knowledge.

Q. 29. From what source did the money come to operate the Northern Railway Company?

A. From the carriage of freight and passengers in Costa Rica.

Q. 30. Anything else?

[fol. 97] A. Unless, as I say, the United Fruit Company may have paid bills for some materials which were purchased; that is the only source that I would know they would get any revenue from.

Q. 31. Except for the carriage of freight and passengers the only source of income was from the United Fruit Company,—isn't that the fact?

A. I don't know that they received any income from the United Fruit Company.

Q. 32. Don't you know that the United Fruit Company did in fact advance money to them?

A. Not in 1918, I don't think they did.

Q. 33. Have they since that time?

A. No, sir; not to my knowledge.

Q. 34. Was the Northern Railway Company in February, 1918, self-supporting?

A. No, sir.

Q. 35. If not who did provide the means for operating it?

A. The means for operating the railroad they could find for themselves, but when it came down to construction work, the Fruit Company would pay for some of the construction material.

Q. 36. Then whatever money was needed, beyond what the railroad itself provided, at that time was furnished by the United Fruit Company, was it not?

A. Yes."

On cross-examination the witness ARTHUR E. NICHOLSON testified as follows:

"X Q. 37. This railroad, of which a part is shown on the map, is or was in 1918 owned by the Northern Railway Company of Costa Rica except as to the part, I understand, which was leased to that company by the Costa Rican Railway?

A. All of this particular part is owned by the Costa Rican Railway Company.

X Q. 38. And leased to the Northern Railway Company of Costa Rica?

A. Yes.

X Q. 39. And the Northern Railway Company operated the railroad?

A. Yes.

X Q. 40. You have said that the capital stock of this company was——

By the Court:

X Q. 41. All this railroad was leased by the Costa Rica Railway Company?

A. This particular part here is owned by the Costa Rica Railway [fol. 98] Company and leased to the Northern Railway Company.

X Q. 42. And operated by the Northern Railway Company?

—. ——.

X Q. 43. Who keeps the books of the Northern Railway Company of Costa Rica?

A. The general head office books we have kept in Boston.

X Q. 44. Who advanced the expenses for financing this railroad in 1918?

A. The Northern Railway Company.

X Q. 45. Who hired the employees of the Northern Railway Company?

A. It was the Northern Railway Company of Costa Rica.

X Q. 46. The United Fruit Company owned the stock of the company, subject, as I understand it, to the rights of the Costa Rica Railway Company, the stock being pledged to secure the performance of the lease?

A. Yes.

X Q. 47. Subject to that pledge the United Fruit Company owned the stock?

A. Yes.

X Q. 48 And to a certain extent they were the same officers, at the head offices in Boston?

A. Yes.

X Q. 49. You gave the names of certain directors of the Northern Railway Company and said they were all directors in the United Fruit Company?

A. Yes.

X Q. 50. But there were many more directors in the United Fruit Company than that, were there not?

A. Yes.

X Q. 51. In some cases where the Northern Railway Company could not finance new building or extensions, you said that the United Fruit Company advanced the money?

A. Yes.

X 52. By way of loan to this company?

A. By the purchase of construction material.

X Q. 53. By the purchase of material?

A. Or rather the payment of bills for construction material to be shipped to the order of the Northern Railway Company.

X Q. 54. Were those entered on the books of the Fruit Company as loans to the Northern Railway Company?

A. It was kept on current account of the Northern Railway Company by the United Fruit Company.

[fol. 99] X Q. 55. As an indebtedness owed by the Northern Railway Company to the Fruit Company?

A. Yes."

The court instructed the jury that there was no evidence to warrant a finding that the defendant United Fruit Company operated the line of railway on which the plaintiff received his injuries, and upon that ground directed a verdict for the defendant United Fruit Company.

The plaintiff duly excepted to the said instruction and direction to the jury, and prays that his exceptions may be allowed.

Michael B. Ryan, by His Attorney, Charles F. Perkins.

ORDER SETTLING BILL OF EXCEPTIONS—September 15, 1922

The foregoing bill of exceptions is allowed.

J. M. Morton, Jr., U. S. D. J.

UNITED STATES DISTRICT COURT

MEMORANDUM OPINION ON MOTION TO SET ASIDE VERDICT—September 6, 1923

MORTON, J.:

The movement of the train which had been captured by the revolutionists after its release by them from territory which they still occupied into that held by the Government forces was an undertaking which required, obviously, very careful management. The defendant was in charge of it, but it was acting according to the undisputed testimony under Government orders. Marsh, the defendant's superintendent, testified that he notified the Governor that the train had been released by the revolutionists and was directed by him to move it to Limon. Chittenden, general manager of the defendant, testified that the railroad officials were acting under the orders of the Government in all matters connected with the

movement of trains; that he received from the Governor at Limon explicit orders to move this train; that Chittenden told the Governor he had better notify the troop train and the Governor agreed to do so, and later said he had done so. It is clear that the troop train was notified to pass a downcoming train at La Pascua siding. Such orders issued by a railroad under Government control obviously [fol. 100] related, and must have been understood to relate, not to a hostile train, but to a peaceful one. Ramsay, the defendant's conductor on the passenger train, informed the officers in command of the troops before the firing what the train was.

The railroad company was bound to use due care to safeguard its passengers, but it was not an insurer of their safety nor was it obliged to protect them against unexepected attack by Government troops. There is no contention,—and no room for one,—that it ought not to have attempted to bring the train forward. Its liability must therefore arise, if at all, out of some omission on its part to do what proper care required in moving the train. Sometimes negligence can be inferred from the mere fact of the accident. But this is not such a case. It devolves upon the plaintiff to offer evidence of some negligent act or omission by the defendant which caused his injury. I am unable to discover in the evidence anything on which a finding of negligence can be supported or to say, even after the event, in what the defendant's agents and servants failed. The jury might, of course, reject the testimony of the defendant's witnesses; but that would not supply evidence of negligence on the defendant's part.

The attack took place, apparently, because the officers in command of the troops lost their heads and behaved with incredible folly. It was an extraordinary occurrence which the defendant had no reason to anticipate and for which it is not liable.

An order may be entered setting aside the verdict for the plaintiff as not warranted in law and entering the alternative verdict for the defendant.

In United States District Court

Petition for and Order Allowing Writ of Error—Filed April 30, 1924

Now come the plaintiffs, H. Anton Bock and Donald Page, administrators of the estate of Michael B. Ryan, both of Milford, Connecticut, in the above entitled cause, and say that on or about the seventeenth day of March, 1924, this court entered a judgment herein in favor of the defendants and against the plaintiffs' intestate, [fol. 101] in which judgment and the proceedings had therein in this case certain errors were committed to the prejudice of the plaintiff's estate, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore the plaintiffs pray this court for an order allowing the plaintiffs to prosecute a writ of error to the United States Circuit

Court of Appeals for the First Circuit from judgment of the District Court of the United States for the District of Massachusetts, in the above-entitled cause for the correction of errors so complained of, and that a transcript of the record and of the proceedings and papers in this cause duly authenticated may be sent to the United States Circuit Court of Appeals for the First Circuit, and that such other and further proceedings may be had as may be proper in the premises.

By Their Attorneys, Charles F. Perkins, Paul F. Perkins.

Allowed May 2, 1924. J. M. Morton, Jr., U. S. District Judge.

IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR—Filed April 30, 1924

The plaintiffs, H. Anton Bock and Donald Page, administrators of the estate of Michael B. Ryan, both of Milford, Connecticut, respectfully specify the following assignment of errors with respect to the proceedings had in the above-entitled cause and the judgment entered therein on March 17, 1924:

1. That the court erred in its order setting aside the verdict for the plaintiff's intestate, and entering the alternative verdict for the defendant the Northern Railway Company.

2. That the court erred in its unqualified statement in its memorandum of decision, that the defendant in moving the train "was acting according to the undisputed testimony under Government orders."

[fol. 102] 3. The court erred in finding, as set forth in its memorandum of decision, that the defendant in operating the train "was acting according to the undisputed testimony under Government orders," the evidence being sufficient to warrant the jury in finding that the defendant was not acting under Government orders in operating the train.

4. The court erred in its statement in its memorandum of decision that the attack by Government troops was unexpected by the defendant company, involving thereby the implication that the defendant had no ground to expect said attack.

5. The court erred in its statement in its memorandum of decision that the attack by Government troops was "unexpected" by the defendant company, involving thereby the implication that the defendant had no ground to expect said attack; there being evidence upon which the jury could have found that the defendant had reasonable ground to expect such an attack.

6. The court erred in stating,

"The jury might, of course, reject the testimony of the defendant's witnesses: but that would not supply evidence of negligence on the defendant's part,"

understanding that the court meant by that statement that there was no evidence of negligence.

7. The court erred in stating in its memorandum of decision that

"The attack took place, apparently, because the officers in command of the troops lost their heads and behaved with incredible folly. It was an extraordinary occurrence which the defendant had no reason to anticipate and for which it is not liable."

These conclusions were drawn from controverted evidence and were questions for the jury.

8. The court erred in its order directing a verdict for the defendant the United Fruit Company.

Charles F. Perkins, Attorney for the Plaintiffs.

[fol. 103] Bond on Writ of Error for $250.00—Approved and filed May 2, 1924; omitted in printing.

[fol. 104] Bond on Writ of Error for $250.00—Approved and filed May 2, 1924; omitted in printing

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[fol. 105] Citation—In usual form, showing service on Robert G. Dodge; omitted in printing

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[fol. 106] In United States District Court

Clerk's Certificate

United States of America,
District of Massachusetts, ss:

I, James S. Allen, Clerk of the District Court of the United States for the District of Massachusetts, certify that the foregoing are true copies of the papers agreed upon by the parties as constituting the record upon the return on writ of error in the cause entitled No. [fols. 107 & 108] 1425 [Title omitted], in said District Court determined, together with the original citation with the acknowledgment of service thereon.

In testimony whereof, I hereunto set my hand and affix the seal of said District Court, at Boston, in said District, this thirtieth day of June, A. D. 1924.

James S. Allen, Clerk. (Seal.)

In United States District Court

Order Enlarging Time—May 28, 1924

Morton, J.:

For good cause shown, It is ordered that the time for docketing this case and filing the record thereof in the United States Circuit Court of Appeals for the First Circuit be enlarged to and including Tuesday, July 1, 1924.

By the Court,

James S. Allen, Clerk.

[fol. 109] In United States Circuit Court of Appeals

[Title omitted]

Opinion—January 6, 1925

Bingham, J.:

This was an action of tort brought by Michael B. Ryan, a citizen of Connecticut, against the Northern Railway Company and the United Fruit Company, New Jersey corporations having their usual places of business at Boston, Massachusetts, to recover damages for injuries sustained while a passenger on the Northern Railway Company's road in Costa Rica, Central America. The writ was dated January 15, 1921. The action was brought in the Federal District Court for Massachusetts.

There were two trials in the District Court. At the first trial a verdict was directed for the United Fruit Company and the jury disagreed as to the Railway Company. At the second trial, in answer to questions submitted by the court, the jury found specially (1) that the plaintiff was injured by the negligence of the defendant, [fol. 110] and (2) that the plaintiff's damages were $35,000, less $10,000 which had been paid him by the Costa Rican government, and returned a general verdict for the plaintiff for $25,000. At the same time, at the direction of the court, they found for the defendant, if, as a matter of law, the plaintiff was not entitled to a verdict, and consented that a verdict might be entered on an order of the District Court for Massachusetts, or of the Court of Appeals, or of the Supreme Court, with the same effect as if returned by them.

On May 5, and within two days of the rendition of the verdict, the defendant filed a motion to set aside the verdict as not war-

ranted in law and asked that the alternative verdict for the defendant be entered in its place. A hearing having been had on the motion, the District Court, on September 6, 1923, entered an order setting the verdict aside and entering the alternative verdict for the defendant, subject to the plaintiff's exception.

The case was thereafter continued from term to term, when, at the December term, 1923, the death of the plaintiff being suggested and administration having been taken out, the administrators, Donald Page and H. Anton Bock, were made plaintiffs. A substituted bill of exceptions having been filed on March 12, 1924, on March 17, 1924, judgment was entered for the United Fruit Company and the Northern Railway Company, and this writ of error was prosecuted.

The errors relied on relate to the order of the District Court setting aside the verdict for the plaintiff and entering the alternative verdict for the defendant Railway Company.

The defendants in their answer, in addition to a general denial, pleaded three special defenses: (1) Assumption of risk; (2) that the plaintiff received the sum of $10,000 from the Republic of Costa Rica as compensation for the injuries in question and gave a release to the said Republic; and (3) that the plaintiff never had a cause of action under the law of the Republic of Costa Rica, and, if he ever had, it was prescribed under said law.

The principal question in the case is whether there was any evidence which warranted the jury in finding that the defendant was [fol. 111] negligent—that through its representatives charged with the duty of operating its road it failed to use the care of the good father or of the average prudent man—a common carrier of passengers, under the law of Costa Rica, not being responsible for the highest degree of care.

Considering the evidence in the light most favorable to the plaintiff it tended to show the following: That at 8 o'clock in the morning of February 23, 1918, the plaintiff became a passenger on defendant's regular east-bound train from San Jose to Port Limon, Costa Rica, which was due to arrive at Limon at 4.30 that afternoon, where he intended to take a steamer the next day for New York; that on the day preceding February 23 an insurrection against the government broke out west of San Jose which the government and railway officials regarded as of a trifling nature; that the train arrived at Turrialba about 11.30 in the forenoon of the 23d, where it was seized by a band of revolutionists and detained there until about 5.45 that afternoon, some of the revolutionists in the meantime having taken the engine and gone back west of Turrialba to destroy the track; that, after the engine was brought back, the passenger train, at about 5.45 p. m., with a number of the revolutionists still on board, proceeded easterly; that the next station reached east of Turrialba and some two or three miles distant therefrom was Torito; that at this point the revolutionists left the passenger train to go back and destroy the Torito bridge and the train proceeded on its way east to Peralta, a distance of three or four miles; that the head offices of the Railway Company were at Limon where

its general manager, superintendent, and chief assistant train dispatchers were located and from which point orders were issued for the movement of trains; that there were telephone and telegraph lines connecting the head offices at Limon with the following stations west thereof, to wit, Turrialba; Peralta, a station some seven miles east of Turrialba; La Pascua, five or six miles east of Peralta; Las Lomas, five or six miles east of La Pascua; and La Junta, some ten or twelve miles east of Las Lomas; and Siquirres, a short distance east of La Junta; that all the orders directing the movements of trains were [fol. 112] made from Limon; that there were no means of communication form one station to another west of Limon; that all communications from such stations had to be to the head offices at Limon which offices alone could communicate to the stations named west of it; that every station that was provided with lines west of Limon had an operator except the stations at La Pascua and La Junta, which had booths; that the passenger train arrived at Peralta about 6 o'clock; that at Peralta word was received to pass an extra going west at La Pascua; that the passenger train proceeded east some five or six miles to La Pascua, arriving there at about 7 o'clock, where it went upon a siding so that the extra might pass, the road being a single track; that the extra coming west proved to be a train bearing government soldiers sent in pursuit of the insurrectionists, and as the extra bearing the troops passed the passenger train the soldiers shot into the passenger car and injured the plaintiff.

The conductor in charge of the passenger train was one Ramsay. He testified that while at Turrialba he called the head office at Limon and informed it that the passenger train had been seized by revolutionists and read a message prepared by some of the passengers of the train which they desired telephoned to the American Consul at Limon; that the head office declined to receive the message for transmission; that the message requested the consul's assistance in getting the train released from the insurrectionists so that they might proceed. There was testimony that while the passenger train was held at Turrialba and before the troop train left Limon, Ramsey notified Limon that the insurrectionists had concluded to release the train and permit it to proceed, but Ramsey did not testify that he gave Limon such information from Turrialba. He did, however, testify that when his train reached Peralta he telephoned Limon that the revolutionists had left the train at Torito and gone back to tear up the Torito bridge.

The head office at Limon, on receiving the information from Turrialba that the passenger train was in the hands of the revolutionists, informed the governor at Limon to that effect and, at 3.30 [fol. 113] that afternoon, a train was started from Limon bearing government troops bound for Turrialba in search of the insurrectionists.

Chittenden, the defendant's general manager, testified that before the troop train left Limon, the trainmen and the commander of the troops were informed that the passenger train at Turrialba was in the hands of the revolutionists; that, when he received word of the release of the passenger train, he communicated that fact to the governor and told him he had better notify the troop train and

that he said he would and afterwards that he did; that he, Chittenden, did not communicate to the trainmen of the troop train that the passenger train had been released or that he knew there were women, children and citizens of other countries among the passengers, but did direct the yard-master at Siquirres to notify the agent at Las Lomas to inform the trainmen of the troop train that women and children were among the passengers; that the governor had an extension of the United Fruit Company's telephone line in his office which permitted him to call up Siquirres; and that the troop train, as he remembered, was at that time between Limon and Siquirres. There was also evidence that the troop train left Siquirres at 5.30 and reached Las Lomas about 6 p. m. or a little earlier; and that that place was five or six miles distant from La Pascua where the trains later met at the time the accident took place.

The defendant contends that it had no reason to anticipate that the soldiers on the troop train would think that the passenger train contained revolutionists and fire upon it; and that, in any event, it took every reasonable precaution to protect the passengers from such action. But we think the jury might reasonably find on the evidence, particularly in view of the testimony that the trainmen and officers of the troop train, before leaving Limon, were informed that the passenger train was in the hands of the revolutionists at Turrialba, that the defendant had reason to anticipate that the trainmen and officers of the troop train, on coming upon the passenger train, might believe that the passenger train contained revolutionists; and that, in [fol. 114] view of this situation, they were bound to take such steps as reasonable prudence required for the protection of the passengers. The defendant says that it took such steps; that, as above pointed out, it notified the governor to inform the troop that the revolutionists had left the passenger train and that the governor said that he would and later that he had, and it seeks to carry the inference that he did so by communicating over his private phone to the troop train at Siquirres. But, on the evidence, we think that it was open to the jury to find that the officers at Limon did not receive word that the revolutionists had left the passenger train until after 6 o'clock when that train reached Peralta, and that, at that time, those in charge at Limon must have known that the troop train had left Siquirres some half an hour or more before; and that they also must have known that the governor could not then reach the troop train over his private phone or over any telephone line except that of the defendant (which was not claimed that he did) and that no such communication was made by the governor to the troops; and that the testimony of Chittenden that he caused the yard-master at Siquirres to communicate with the agent at Las Lomas that women and children were on the passenger train could likewise have been disregarded, for there was testimony that the agent at Las Lomas could not be reached over the company's wires except from Limon.

Powers, the chief train dispatcher at Limon, testified that he was in the train dispatcher's office at 5.30 and remained there with his assistant, Dingledine, until after the accident occurred; that he was present when Dingledine telephoned the orders as to the meeting of

the passenger and troop trains at La Pascua; that the order to the passenger train was "Engine 38 run Paralta to Siquirres as an extra. Meet Special West engine 48 at Pasuca;" and that the order to the troop train was "Engine 48 run Siquirres to Paralta as a special to meet extra east engine at Pascua."

Dingledine, the assistant train dispatcher, testified that he got a message from Ramsey from Peralta which read: "All the rebels have gotten off the train at Torito with the intention of destroying the bridge and disconnecting the track;" that after getting that [fol. 115] message he sent a communication to the agent at Las Lomas for the conductor of the troop train as to meeting the passenger train; that the message read something like this: "Put out train order to meet the train at Pascua," and that "Special 38 east has no revolutionists on the train;" that he also sent a message to Siquirres for the conductor of the troop train saying that the "passenger train has been released and I will give you meet orders later;" that the order he sent were in writing but that he had none of them with him. Then later he testified that the agent at Las Lomas would write the message out as any ordinary telephone message and deliver it to the conductor with the train orders in the same manner; that he, as dispatcher, kept nothing in writing.

Marsh, the superintendent, testified that train orders were issued in writing; that records of the orders for train movements were kept in the train dispatcher's office; that the train dispatcher's duties were to make notes of anything that affected train service in any way.

Ramsey testified that at Peralta he received a train order to meet the special west at La Pascua and that he left a message there advising the head office that Torito bridge would be obstructed, that some of the revolutionary forces got off there, and that he had left the revolutionists at Torito.

From the foregoing evidence it appears that Powers, the chief train dispatcher, testified that the order to the troop train was "Engine 48 run Siguirres to Peralta as a special to meet extra east engine at Pascua," and that Dingledine, his assistant, testified that that message also contained a statement that a "special 38 east has no revolutionists on the train." Because of this discrepancy in their testimony it was for the jury to say whether the chief or the assistant dispatcher was correct as to what the message embodying the order contained, and in view of the testimony of Marsh that a record of orders affecting train service was kept in the train dispatcher's office at Limon and that it was the duty of the train dispatcher to keep records of anything that affected train service in any way, and that Dingledine testified that he did not keep [fol. 116] records of such orders, it was open to the jury to disbelieve the testimony of Dingledine and find that the orders communicated by him to Las Lomas and Siquirres did not contain the information that there were no revolutionists on the east-bound or passenger train and that if the messages had contained the information, the defendant would have produced the written record of the orders which the train dispatcher was required to keep at the Limon office, which it did not do.

Inasmuch as the officers of the troops and the men in charge of the troop train had been informed by the defendant's general manager that the passenger train at Turrialba was in the hands of the revolutionists and knew that La Pascua, where the trains were to pass, was only about twelve miles distant from Turrialba, and as the defendant had resonable grounds to anticipate that the trainmen and officers in charge of the troops might understand that the oncoming passenger train contained armed enemy forces, unless informed by the governor and those in charge at Limon that no enemy forces were on the passenger train, and as the Jury might find that no such warning was given to the officers of the troops or to the trainmen by the governor of those in charge at Limon, the question reduces itself to whether, in the absence of such information from these sources being given and in view of all the other evidence in the case, including what transpired at La Pascua on the meeting of the trains, no other conclusion could reasonably be drawn than that the defendant was free from fault.

As above stated, the evidence shows that the passenger train reached La Pascua at about 7 o'clock and went upon the siding to await the coming of the west-bound train; that Ramsey, the conductor of the passenger train, on arriving at La Pascua, was unaware that the west-bound train bore government troops; that, after waiting there some five minutes, the west-bound train appeared and stopped its engine about opposite the engine of the passenger train; that Ramsey went forward and was heard to speak with one of the officers of the troops; that two witnesses testified that he said that there were no revolutionists on the passenger train; that he then gave the signal for the [fol. 117] passenger train to go forward, but that the officers of the troops ordered him to stop; that the passenger train consisted of an engine, two or three freight cars, a combination baggage and passenger car, one or two coaches, and a pay car, carrying express and money, arranged in the order named; that the troop train was started, and as it moved along, the barrels of the rifles of the soldiers could be seen in alignment extending from the windows of the troop train in the direction of the passenger train; that as the troop train drew opposite the combination baggage and passenger car an officer gave an order to fire, which the soldiers obeyed; that the firing continued, and when the cars containing the troops came opposite the passenger cars, the troop train was suddenly brought to a standstill; that numerous shots were discharged into the open windows of the passenger train, out of which, prior to the shooting, passengers had been looking. The result was that several of the passengers were killed and others wounded, including the plaintiff, who was seriously injured. There was evidence that some of the soldiers on the steps of the platform of the troop train could have seen women and children at the windows of the passenger cars as the troop train approached, "but that the bulk of the soldiers couldn't see anything over a square equal to one window because they were sighting right along their guns, and that they were sighting at the time that they came in sight of this train."

The record does not show that Ramsey testified as to what he said

to the officers of the troops, but it does appear that he testified that "when the firing began he hollered several times to the troops that they were firing at passengers, that there were no revolutionists on board."

It is evident that the troops and their officers believed that the passenger train contained revolutionists—otherwise it is practically impossible to account for their action—and the jury might have found that, inasmuch as Ramsey, the conductor, did not testify as to what he said to the officers in charge of the troops prior to the shooting but did testify that when the shooting began he cried out that there were no revolutionists on the train, nothing of the kind was [fol. 118] said until after the shooting began; that the troops and their officers never received any information as to the harmless character of the occupants of the train or received it too late and under such circumstances as to render it unavailable.

We think the case was properly submitted to the jury; that it could not be said that there was no evidence from which it might reasonably be found that the defendant was negligent and that its negligence was the cause of the plaintiff's injury.

Neither can it be said that the plaintiff assumed the risk, for the evidence shows that neither he nor Ramsey, the conductor, until they reached La Pascua, knew or had any reason to know, that the westbound special contained government troops in search of the revolutionists and that the troops believed that the revolutionists were on the passenger train.

The evidence introduced at the trial relating to the law of Costa Rica shows that it was the defendant's duty to the plaintiff to exercise the care of a good father or that of a reasonably prudent man, and that, for a breach of this duty, the plaintiff had a right of action which was not barred by limitation, as the limitation relied upon applied to actions of contract and not of tort.

It also appears that the plaintiff's acceptance of the offer of the Costa Rican government, under which he received the ten thousand dollars from that government on account of the injuries sustained at La Pascua, was not to take effect until his acceptance reached the Costa Rican government, and that the resulting contract is to be interpreted according to the law of that country; that, under the law of that country, a creditor means a person who can exact, and a debtor one from whom an exaction can be made; that, while the Republic of Costa Rica could be sued for a wrong committed by it, a judgment against it would not be enforceable by execution or ordinary process, but only upon the government's voluntarily providing means for its satisfaction, and that, therefore, the Republic of Costa Rica was not a solidary debtor whose release from liability would, under its law, absolve the defendant, and that this was so, without [fol. 119] regard to whether the plaintiff, at the time he gave the release, reserved his right against the defendant under Article 642 of the Code.

It is further argued by the defendant that if the plaintiff, in giving his release to the Costa Rican Republic, reserved his right against the defendant—and it is conceded that he did according to the under-

standing of the parties at the time the release was given, although it was not expressly so stated—the plaintiff, under Articles 756 and 757 of the Civil Code of Costa Rica—provisions declaring the equivalent of our parole evidence rule,—could not introduce parole evidence to show that such reservation was made. The defendant, however, was not a party to the release nor does it claim under any right of Costa Rica. It was a stranger and in controversies between strangers or between one of the contractors and a stranger, either party may show by parole what the true transaction was. Barreda v. Silsbee, 21 How. 146, 165-170; Libby v. Company, 67 N. H. 587, 588. But we regard this branch of the discussion as immaterial. The Republic of Costa Rica was not a solidary debtor within the meaning of Article 642 of the Code of Costa Rica, as the plaintiff could not enforce a judgment against it if obtained. And the defendant cannot complain because the plaintiff voluntarily consented to having his damages reduced to the extent of ten thousand dollars.

The plaintiffs in error have waived their exception to the action of the District Court in directing a verdict for the United Fruit Company, and, if they had not, we are of the opinion that the verdict as to that company was properly directed.

The judgment of the District Court in favor of the Northern Railway Company is vacated, the verdict in its favor is set aside, and the case is remanded to that court with directions to enter a verdict and judgment for the plaintiffs in error as to it, with costs.

The judgment of the District Court in favor of the United Fruit Company is affirmed, with costs.

[fol. 120] In United States Circuit Court of Appeals

Dissenting Opinion

Johnson, J. (dissenting):

I am unable to reach the conclusion that there was any evidence in the case to sustain the verdict. In order to sustain his action it was necessary for the plaintiff to prove that the railway company knew that the commander of the troops had reasonable cause to believe that the revolutionists were on the passenger train when it was met by the troop train at La Pascua. There was no evidence that the defendant knew that the revolutionists were on the passenger train when it left Turrialba. On the contrary, there was evidence that the defendant's general manager and its superintendent had received a communication from the conductor of the passenger train, which he sent or caused to be sent from Turrialba, stating that the revolutionists had surrendered the train; and that this information had been given to the governor of Limon and his permission obtained to move the passenger train from Turrialba. Obviously, the governor knew that the revolutionists had surrendered the train before it left Turrialba, which it did, as testified by the plaintiff and the conductor,

about 5.30 p. m. and by the train dispatcher, between 5.30 and 5.45 p. m. How long before the train left Turrialba the governor was notified, the evidence does not disclose.

Dingledine, the assistant train dispatcher, testified that he received a communication to this effect from Ramsay at Turrialba about 5.15 p. m., immediately after he went on duty, which was at 5 p. m., and that he at once notified the superintendent.

If it can be said that, under all the circumstances, it was the duty of the defendant to notify the troops that the revolutionists had surrendered the passenger train, this duty was discharged when the governor was notified. The troops had been dispatched under his direction and their commander was subject to his orders and not to those of the officers of the railway company.

It appears from the evidence that the governor had access to the telephone in the dispatcher's office at Limon and had used it during that day; that he also had access to another line. If any necessity existed for notifying the troops that there were no revolutionists on [fol. 121] the passenger train, the railway officials had a right to assume that the governor had performed his duty and notified them, as he said he had.

There was nothing about the appearance of the train which was different from that of an ordinary combination freight and passenger train; and the fact that orders were given from the railroad offices at Limon to the troop train at Las Lomas to cross an east bound special at La Pascua was in itself sufficient to notify the troop train that the special which it was to meet was not a hostile train. The whole situation, as developed by the evidence, was one which furnished no basis for any finding by the jury that the defendant knew that the troops had reasonable grounds to believe that this passenger train was carrying revolutionists when met at La Pascua. There was undisputed evidence that when the troop train arrived at La Pascua the officers in charge of the troops received information that there were no revolutionists aboard the passenger train. When the engine of the troop train was opposite the engine of the passenger train the conductor of the latter, who was standing upon the ground between the two trains, flagged the oncoming troop train and told the engineer that the revolutionists had destroyed a bridge near Torito. Two officers then alighted from the troop train and one of them inquired of the conductor what the train upon the siding was and was told that it was the regular passenger train from San Jose to Limon. A witness for the plaintiff, who was standing nearby, testified that the conductor told this officer, both in English and in Spanish, that there were no revolutionists aboard the passenger train.

Vietch, a witness for the defendant, a consular agent of the Italian Government, who was also there, testified that he was asked by the other officer what the train on the siding was and he told him that it was the passenger train from San Jose to Limon and that it had no revolutionists aboard.

The record contains only an abstract of the testimony and the questions of the officer which drew out this information are not

given; but presumably they were given in answer to inquiries of [fol. 122] the officers where there were any revolutionists abroad the passenger train. The officers evidently did not believe the statements of the conductor and the other party and when the conductor of the passenger train ordered his train to move along the siding they ordered it to stop and the troop train was started. When the cars of the troop train came opposite the two coaches of the passenger train one of these officers raised his sword and gave the command to fire. The windows of the coaches of the passenger train were open and there was evidence that several passengers, women among them, could be seen looking out of the windows when the firing began; and that one woman was killed who was looking out of a window.

The consular agent who was standing between the two trains received one or two bullets through his clothing and escaped further injury by diving under one of the coaches of the passenger train. As a result of this shooting fifteen or twenty passengers in the passenger train were wounded and four or five killed. Among the wounded was the plaintiff.

There was uncontradicted evidence that this shooting occurred at about 7 p. m., when there was perfect visibility for a distance of two hundred feet. There was no armed person on or about the passenger train and there was nothing about its appearance to create a suspicion, certainly not a reasonable belief that it had armed revolutionists abroad. It is evident that the exercise of the slighest degree of caution would have satisfied the officers in charge of the troops that the statements of the conductor and of the Italian consular agent were true.

I cannot escape the conclusion that the verdict of the jury that the defendant was guilty of negligence under the law of Costa Rica was not sustained by the evidence and that the District Court did not err in setting it aside.

[fols. 123-136] Petition for rehearing, covering 15 pages, omitted from this print

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[fol. 137] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

OPINION ON PETITION FOR REHEARING—March 9, 1925

Per CURIAM:

This is an application (1) for rehearing; (2) for an enlargement of the transcript of record on the ground that certain evidence introduced at the trial has been omitted; and (3) for a modification of our mandate so that the defendant may apply to the District Court for the purpose of showing that under the law of Costa Rica

the right of action did not survive and that the administrators of the plaintiff's estate were improperly admitted to prosecute the cause.

1. As no member of the court who concurred in our decision of January 6, 1925, desires a rehearing, it is denied.

2. As to enlarging the record, we will say that we have examined the affidavit attached to the defendant's application and said to con-
[fol. 138] tain the omitted testimony; that it there appears that Ramsey testified that what he said to the officers of the troop-train—"that his train was the regular passenger train, without any Revolutionists on board"—was not said until after the trains were moving past one another, and that the order to the troops to fire was given at substantially the same time and while the troop-train was still moving along. If the record were enlarged as desired, we are of the opinion that it would not alter the conclusion reached in our decision of January 6.

3. We are also satisfied that there is no occasion for a modification of our mandate on the ground suggested. The action was brought in the Massachusetts District to recover damages for personal injuries. After the completion of the trial in the District Court, the plaintiff died, and his administrators were permitted to appear, without objection, and further prosecute the action. The contention of the defendant with reference to this matter is that the plaintiff left no heirs in the ascending or descending line, and that such being the case, by the law of Costa Rica, where the accident occurred, the action did not survive. But by the law of Massachusetts, where the action was brought, the right of action survived. Mass. Gen. Laws, c. 228, s. 1. The right to revive the action is not affected by the fact that the plaintiff received his injuries in Costa Rica The action having been brought in the Massachusetts District, the right to revive it is governed by the law of Massachusetts, not by that of Costa Rica.

In Baltimore & Ohio R. R. Co. v. Joy, Admr., 173 U. S. 226-228, the Court of Appeals for the Sixth Circuit certified the following question to the Supreme Court: "Does an action pending in the Circuit Court of the United States sitting in Ohio, brought by the injured person as plaintiff to recover damages for injuries sustained by the negligence of the defendant in Indiana, finally abate upon the death of the plaintiff in view of the fact that, had no suit been brought at all, the cause of action would have abated both in Indiana and Ohio, and that, even if suit had been brought in Indiana, the action would have abated in that state?" The answer was that it did not.

[fol. 139] See also

Martin v. Wabash R. R. Co., 142 Fed. 650.
Van Choate v. General Electric Co., 245 Fed. 120, 121.
Wing v. McCallum, 292 Fed. 810.

Petition denied.

IN UNITED STATES CIRCUIT COURT OF APPEALS

MINUTE ENTRIES

On October 15 and 16, 1924, this cause came on to be heard, and was fully heard by the court, Honorable George H. Bingham, Honorable Charles F. Johnson and Honorable George W. Anderson, Circuit Judges, sitting.

Thereafter, to wit, on the sixth day of January, A. D. 1925, the opinion of the court (page 109) was announced, a dissenting opinion by Johnson, J. (page 120) was filed and the following Judgment was entered:

IN UNITED STATES CIRCUIT COURT OF APPEALS

JUDGMENT—January 6, 1925

This case came on to be heard October 15 and 16, 1924, upon the transcript of record of the District Court of the United States for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now, to wit, January 6, 1925, here ordered, adjudged and decreed as follows: The judgment of the District Court in favor of the Northern Railway Company is vacated, the verdict in its favor is set aside and the case is remanded to that court with directions to enter a verdict and judgment for the plaintiffs in error as to it, with costs. The judgment of the District Court in favor of the United Fruit Company is affirmed with costs.

By the Court.

Arthur I. Charron, Clerk.

Thereafter, to wit, on the sixth day of February, A. D. 1925, a petition for rehearing (page 123) was filed by the Northern Railway Company, defendant in error, and on the ninth day of March, A. D. 1925, a per curiam opinion was filed (page 137) and the following Order of Court was entered:

[fol. 140] IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER DENYING PETITION FOR REHEARING—March 9, 1925

No judge who concurred in the judgment entered January 6, 1925, desiring a rehearing, It is ordered that the petition for rehearing filed February 6, 1925, be, and the same hereby is, denied.

By the Court.

Arthur I. Charron, Clerk.

Thereafter, to wit, on the seventh day of March, A. D. 1925, mandate issued to the District Court.

IN UNITED STATES CIRCUIT COURT OF APPEALS

CLERK'S CERTIFICATE

I, Arthur I. Charron, Clerk of the United States Circuit Court of Appeals for the First Circuit, certify that the printed pages numbered 1 to 140, inclusive hereto prefixed, contain and are a true copy of the record and proceedings to and including May 28, 1925, in the cause in said court numbered and entitled No. 1771 [title omitted].

In testimony whereof, I hereunto set my hand and affix the seal of said United States Circuit Court of Appeals for the First Circuit at Boston, in said First Circuit, this twenty-eighth day of May A. D. 1925.

Arthur I. Charron, Clerk. (Seal of the United States Circuit Court of Appeals, First Circuit.)

[fol. 141] IN SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 12, 1925

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 142] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1925

NORTHERN RAILWAY COMPANY, Petitioner,

v.

DONALD PAGE et al., Administrators, Respondents

STIPULATION AND ADDITION TO RECORD—Filed December 22, 1925

It is hereby stipulated by and between the parties to the above entitled cause that the following documents be made a part of the record, namely:

1. The certificates hereto annexed and marked respectively "A," "B" and "C."

2. The map marked "Exhibit XX" and referred to in the bill of exceptions on page 17 of the "Transcript of Record of District Court" to the United States Circuit Court of Appeals.

R. G. Dodge, Counsel for Petitioner. Chas. F. Perkins, Counsel for Respondents.

[fol. 143] C

DISTRICT COURT OF THE UNITED STATES, DISTRICT OF MASSACHUSETTS

No. 1425, Law

DONALD PAGE et al., Administrators,

v.

UNITED FRUIT COMPANY et al.

MOTION OF DEFENDANT NORTHERN RAILWAY COMPANY TO VACATE JUDGMENT—April 18, 1925

The defendant Northern Railway Company says that it intends to petition the United States Supreme Court for a writ of certiorari to review the decision of the Circuit Court of Appeals for the First Circuit on its petition for a re-hearing, and that it is moving the said Circuit Court of Appeals to recall the mandate, wherefore the said Northern Railway Company moves that the judgment for the plaintiffs heretofore entered in this court in accordance with the terms of the mandate be vacated.

By Its Attorneys, Storey, Thorndike, Palmer & Dodge.

May 5, 1925.—Brewster, J. Motion to vacate judgment for plaintiff allowed and judgment accordingly vacated.

A true copy.
Attest:
John E. Gilman, Jr., Deputy Clerk. (Seal of the United States District Court, Massachusetts.)

[Endorsed:] 1425, Law. No. 1425, Law. Donald Page et al., Administrators, v. United Fruit Company et al. Motion of Defendant Northern Railway Company to Vacate Judgment. United States District Court, Mass. Dist. Filed in Clerk's Office Apr. 18, 1925. Aug. 5, 1925. The within motion may be substituted as an exact copy of the original motion filed April 18, 1925 which original has been lost or mislaid. Chas. F. Perkins, Plfts. Atty. Substituted for original filed Apr. 18, 1925.

[fol. 144] B

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 1771

DONALD PAGE et al., Administrators,

v.

UNITED FRUIT COMPANY et al.

MOTION OF DEFENDANT NORTHERN RAILWAY COMPANY TO RECALL MANDATE

The defendant Northern Railway Company says that it intends to petition the Supreme Court of the United States for a writ of certiorari to review the decision of this court on the petition of the said Northern Railway Company for re-hearing, wherefore it moves that the mandate to the District Court for the District of Massachusetts be recalled and the judgment heretofore entered in the said District Court in accordance with the provisions of the said mandate be vacated.

By Its Attorneys, Storey, Thorndike, Palmer & Dodge.

CLERK'S CERTIFICATE

I, Arthur I. Charron, Clerk of the United States Circuit Court of Appeals for the First Circuit, certify that the foregoing is true copy of a motion to recall mandate presented to, and denied by, said United States Circuit Court of Appeals for the First Circuit on April 22, 1925.

In testimony whereof, I hereunto set my hand and affix the seal of said United States Circuit Court of Appeals for the First Circuit, at Boston, in said First Circuit, this third day of August, A. D. 1925.

Arthur I. Charron, Clerk. (Seal United States Circuit Court of Appeals, First Circuit.)

[fol. 145] A

UNITED STATES DISTRICT COURT

Law Docket

No. 1425, Law

Title of Case

MICHAEL B. RYAN (H. ANTON BOCK and DONALD PAGE, Admrs.)

v.

UNITED FRUIT COMPANY et al.

Contract or Tort

Attorneys:

Charles F. Perkins, Paul F. Perkins.

Robert G. Dodge, Raymond S. Wilkins, Storey, Thorndike, Palmer & Dodge.

Extract from Docket Entries

* * * * * * *

Date			Filings—Proceedings
Month	Day	Year	
Mar.	20,	1925.	Mandate of United States Circuit Court of Appeals received and filed, judgment of District Court in favor of Northern Railroad Co. is vacated; verdict in its favor is set aside and case remanded with directions to enter a verdict, and judgment for the plaintiff as to it with costs. Judgment of the District Court in favor of United Fruit Company is affirmed with costs. Costs in Circuit Court of Appeals to be satisfied under direction of District Court taxed in favor of Donald Page, et al., Administrators, and against the Northern Railroad Company at $298.40 and in favor of United Fruit Company against Donald Page et al., administrators at $20 filed.
	23,		Plaintiff's motion for entry of judgment in accordance with mandate and for issuance of execution filed.

Date			Filings—Proceedings
Month	Day	Year	
Mar.	23,	1925.	Morton, J.: Motion for entry of judgment allowed; judgment on the alternative verdict for plaintiffs against Northern Railway Co. of Costa Rica in the sum of $27,833.33 damages and interest and for its costs taxed at $448.85. (Judgment for the defendant United Fruit Company and for its costs taxed at $—, entered.)
Apr.	18,	1925.	Agreement on taxation of plaintiff's costs filed.
	22,		Motion of deft. Northern Railway Co. to vacate judgment filed.
	27,		Brewster, J.: Heard on motion of defendant, Northern Railway Co. to vacate judgment; taken under advisement. (Entered.)
May	5,		Brewster, J.: Motion to vacate judgment for plaintiff allowed and judgment accordingly vacated. (Entered.)
June	8,	1925.	Motion of deft. Northern Ry. Co. to continue case for judgment filed.
Aug.	5,	1925.	Plaintiff's notice of exception to order allowing defendant's motion to vacate judgment filed

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[fol. 146] District Court of the United States, District of Massachusetts.

I, John E. Gilman, Jr., Deputy Clerk of the District Court of the United States for the District of Massachusetts, and during the temprorary absence of the Clerk in charge of the Clerk's Office of said Court, and the custodian of its files and records, do hereby certify that the foregoing is a true copy of an Extract from the Docket Entries, in the cause in said District Court, entitled, No. 1425, Law, Michael B. Ryan (H. Anton Bock and Donald Page, Admrs.), v. United Fruit Company, now pending in said District Court.

In testimony whereof, I hereunto set my hand and affix the seal of said Court, at Boston, in said District, this third day of August, A. D. 1925.

John E. Gilman, Jr., Deputy Clerk. (Seal of the United States District Court, Massachusetts.)

[fol. 147] [File endorsement omitted.]

In United States Circuit Court of Appeals for the First Circuit, October Term, 1924

No. 1771

Donald Page et al., Administrators, Plaintiffs, Plaintiffs in Error,

v.

United Fruit Company et al., Defendants, Defendants in Error

Petition of Northern Railway Company (One of the Defendants in Error) for Rehearing

To the Honorable the Judges of the United States Circuit Court of Appeals for the First Circuit:

The Northern Railway Company, one of the defendants in error in the above-entitled cause, respectfully represents that the opinion rendered by this court on January 6, 1925, is (in so far as it reaches the conclusion that the judgment of the District Court in favor of said Northern Railway Company should be set aside and that judgment should be entered against it in favor of the plaintiffs in error) based in several important particulars upon misapprehension.

I

1. As to whether the officers in charge of the troop train were notified that there were no revolutionists on board the passenger train, the court say that "the evidence shows that * * * [after the arrival of the troop train at La Pascua] Ramsay [the conductor of the passenger train] went forward and was heard to speak with one of the officers of the troops" and that "two witnesses testified that he said that there were no revolutionists on the passenger train" (Opinion, p. 8). One of these witnesses was a passenger named Grant, who was called by the plaintiff and who testified not only that he heard Ramsay say to one of the officers in charge of the troop train that there were

no revolutionists on board but also that he heard Veitch, another passenger, say substantially the same thing (Record, p. 20). The other witness was Veitch, who was called by the defendants and who testified that one of the officers in charge of the troop train asked him what the other train was, to which he replied that it was the passenger train from San Jose to Limon and that there were no revolutionists on board (Record, p. 19). It is also stated in the bill of exceptions, not simply as a summary of any particular testimony but as a fact established by undisputed evidence, that one of the officers "said to Ramsay 'What train is this?' to which he replied that it was the regular passenger train" and that Ramsay "told the officer in English and in Spanish that there were no revolutionists on board" (Record, pp. 18-19). The court, nevertheless, say that "the jury might have found that, inasmuch as Ramsay, the conductor, did not testify as to what he said to the officers in charge of the troops prior to the shooting but did testify that when the shooting began he cried out that there were no revolutionists on the train nothing of the kind was said until after the shooting began" (Record, pp. 9-10). This passage, if the petitioner understands it correctly, means that, if Ramsay did not testify one way or the other with respect to conversation with the officers prior to the shooting, his omission so to testify constituted affirmative evidence that there was no such conversation and justified the jury in disbelieving the positive testimony given on this subject not only by Veitch, who was called by the defendants, but by Grant, the plaintiff's own witness. Such a conclusion would be so manifestly unsound that the petitioner cannot but believe that the passage referred to is the result of some inadvertence or misapprehension on the part of the court.

(a) At the trial all parties assumed that there was no question but that, upon the arrival of the troop train, Ramsay stated to the officers in charge that there were no revolutionists on board the passenger train. This appears from the passage quoted above from the bill of exceptions (Record, pp. 18-19), from the memorandum filed by the District Judge,—in which it is stated as an undisputed fact that "Ramsay, the defendants' conductor on the passenger

train, informed the officers in command of the troops before the firing what the train was" (Record, p. 100),—and from the brief and argument presented in this court in behalf of the plaintiffs in error, in which no question was raised as to the notification given by Ramsay.

(b) The burden of proving negligence was on the plaintiff. Until some affirmative evidence to that effect was produced, the defendants were under no obligation to go forward and no adverse inference could be drawn from their omission to do so. If no evidence warranting a finding that Ramsay failed to give notice to the troop train was produced by the plaintiff, there was nothing for the defendants to meet and, if they omitted to offer his testimony on this point, the fact was of no significance. Indeed, a party's failure to produce evidence never constitutes independent proof of any fact; it simply raises an inference that he is not in a position to contradict such affirmative evidence as the other party may have introduced on the subject in question.

Owens Bottle-Machine Co. v. Kanawha Banking & Trust Co. (C. C. A. 4th Circ.) 259 Fed. Rep. 838.
W. F. Corbin & Co. v. United States (C. C. A. 6th Circ.) 181 Fed. Rep. 296.
Porcino v. De Stefano, 243 Mass. 398.
Stimpson v. Hunter, 234 Mass. 61.
Poirier v. Terceiro, 224 Mass. 435.
Tully v. Fitchburg Railroad, 134 Mass. 499.

(c) The conclusion that notice was not given by Ramsay could be arrived at only by disbelieving the positive testimony of Grant, the plaintiff's witness, to the contrary. It is doubtless true that, if the testimony given by a witness called by the plaintiff is contradicted by that given by a witness called by the defendant, the plaintiff is not conclusive bound by the testimony of the witness whom he called, but may ask the jury to believe the witness called by the defendant. This, however, is not a case of that kind. Since there was no evidence to contradict Grant's testimony, the case could be decided only on the assumption that it was true; the plaintiff could not go to the jury on

the theory that his own witness's uncontradicted testimony might not be believed.

Standard Water Systems Co. v. Griscom-Russell Co. (C. C. A. 3rd Circ.) 278 Fed. 703, 705; certiorari denied 259 U. S. 580.

In re Calvi (D. C., N. D., N. Y.) 185 Fed. 642, 652.

Coonrod v. Kelly (C. C. A. 3rd Circ.) 119 Fed. 841, 846.

Boudreau v. Johnson, 241 Mass. 12, 15.

Minihan v. Boston Elevated Ry., 197 Mass. 367, 373.

(d) Even if the plaintiff's evidence had been sufficient to make out a prima facie case, an omission on the part of the defendants to question Ramsay as to whether he spoke to the officers in charge of the troop train before the firing would not have raised an inference that he would have testified adversely to the defendants on this point. Since Ramsay was present in court the plaintiff was at liberty to examine him on all aspects of the controversy; hence the case comes within the well-established rule that, when a witness is available to both parties, the fact that he does not testify warrants no inference in favor of either.

Iowa Central Railway v. Hampton Electric Light & Power Co. (C. C. A. 8th Circ.) 204 Fed. Rep. 961.

Erie Railroad v. Kane (C. C. A. 6th Circ.) 118 Fed. Rep. 223.

2. The plaintiffs, as pointed out above, have never questioned the fact that Ramsay gave notice to the troop train upon its arrival at La Pascua; their contention has always been that the defendant was negligent in failing to get word to the troops before the trains met. The uncontradicted evidence introduced by the defendant was unequivocally to the effect that everything practicable was done by way of giving such prior notice, but, even if the case be considered on the plaintiff's evidence alone, it is apparent that the failure, if any, to give such notice was not the proximate cause of the injury. If the statement of Ramsay on the spot was disbelieved by the troops, no prior notifications received in a roundabout way from Limon, however numerous, would have been believed. If the firing was the result of hot-headedness, nothing the defendant could have done

would have made the slightest difference in the result. It cannot be said that a failure to notify the troops before they reached La Pascua was the proximate cause of an accident which would have occurred precisely as it did, even if the notification had been given. The troops fired on the passenger train after being notified on the spot that it had no revolutionists on board (Record, p. 19), after plenty of opportunity for a full examination into the truth of this statement (Record, pp. 18-20; 33-34), and in the face of the unquestioned innocent appearance of the train, fully described by the plaintiff and his witness Grant (Record, pp. 32-36). Ramsay, the plaintiff admits, was well known and well liked by everybody (Record, p. 28). His statement was unavailing. It is stated in the bill of exceptions as a fact established by undisputed evidence that Veitch, a merchant and consular agent, confirmed Ramsay's word and Grant's testimony is to the same effect (Record, pp. 19-20). Yet the troops were ordered to fire by the very individuals to whom these two had just spoken,—again referring to the uncontradicted testimony given by the plaintiff's witness (Record, p. 20). This is a very different picture of what occurred at La Pascua from that which the court assumed as a basis for its decision (Opinion, pp. 9-10), —an assumption which is radically at variance with the uncontradicted evidence introduced by the plaintiff and could have been made, the petitioner believes, only in consequence of some misapprehension. The petitioner submits that the error so vitally affects the result that on this ground, apart from that considered above, the case should be reopened.

II

The petitioner believes that the court misunderstood its position on the affirmative defense of the plaintiff's settlement of his claim against the Government of Costa Rica The petitioner does not rely upon the negotiations of 1921 (Record, pp. 89 92) which might well lead the court to arrive at the opinion it has expressed, but upon the settlement effected in New York in August, 1918, as evidenced by the exchange of letters between the plaintiff and Carlos Lara, the Costa Rican ambassador, representing that government (Record, p. 69). These letters appear as defendants'

Exhibits "C" and "D" (Record, pp. 92-93). These letters were written, mailed and received in this country. There is not a word in either of them or in the testimony which would tend to show that the agreement was not to take effect until the plaintiff's acceptance reached Costa Rica, but on the contrary the ambassador states in his letter (Record, p. 92) that his government has instructed him to arrange with the plaintiff concerning the settlement. The offer is in definite, unqualified terms:

"The Government of Costa Rica will pay you ten thousand dollars as follows: five hundred dollars monthly from the first day of September next" (Record, p. 92),

and the acceptance reads:

"If you arrange for a certain payment of ($500) five hundred dollars the first of each month, at the National City Bank, as you spoke of, it will be agreeable to me, until the sum of ($10,000) ten thousand dollars has been paid. This sum pays the claim in full" (Record, p. 93).

This is clearly an agreement made by offer and acceptance in this country, with no suggestion of qualified authority of the ambassador and no thought of the necessity of ratification or any other action by the Costa Rican home government before the agreement should become binding. It is submitted that the statement by the court that "the plaintiff's acceptance * * * was not to take effect until his acceptance reached the Costa Rican Government" (Opinion, p. 10) is wholly inapplicable to this agreement, which is the one upon which the defendant has always relied; in that event the next statement by the court,—"that the resulting contract is to be interpreted according to the law of that country" (referring to Costa Rica),—is a fortiori mistaken. It follows that the court's reasoning on this branch of the case, being based on Costa Rican law, is not in point and that justice requires a further hearing as to the common law applicable to the settlement.

III

The petitioner submits that, if a rehearing should not be granted, the court should at least modify the mandate so that final judgment shall not be entered by the District

Court until the petitioner has had opportunity to present in that court two questions which vitally affect the result

1. The opinion of the court, as already noted, proceeds on the assumption that Ramsay did not testify as to whether, prior to the shooting, he informed the officers in charge of the troop train that there were no revolutionists on board the passenger train. The fact, as shown by the affidavit annexed to this petition, is that he did so testify in most unequivocal language. The only reason why the petitioner did not insist upon the insertion of this testimony in the bill of exceptions was that it assumed that this court would apply the rule which has long been followed by the Supreme Judicial Court of Massachusetts, i. e., that the question of a plaintiff's right to go to the jury must be determined solely with reference to the affirmative evidence tending to sustain his position.

"In deciding * * * whether as matter of law the plaintiff was not entitled to recover, the evidence favorable to the defendant must be laid on one side."

Loring, J., in Boylston Bottling Co. v. O'Neill, 231 Mass. 498 (at p. 500).

Cain v. Southern Massachusetts Telephone Co., 219 Mass 504, 507, is to the same effect.

Hence the Supreme Judicial Court regards it as neither necessary nor proper, in a case turning on the plaintiff's right to go to the jury, to cumber the bill of exceptions with evidence which has no tendency to support the plaintiff's contention.

Isenbeck v. Burroughs, 217 Mass. 537.

If a rehearing is not granted in this court, the petitioner should at least be permitted to submit to the District Court the question whether the bill of exceptions ought not to be corrected, so that the case shall not be decided upon an assumption exactly contrary to the fact. The District Court has ample power to make such a correction and the present situation is one calculated to appeal peculiarly to its discretion.

Burbank v. Farnham, 220 Mass. 514.
McCarren v. McNulty, 7 Gray, 139.

After the correction had been made, a new judgment could be entered in the District Court and a writ of error prosecuted to reverse this judgment, thereby bringing the case before this court upon a record which would fully and accurately exhibit the evidence.

2. Shortly after the trial in the District Court, the plaintiff died. The administrators of his estate thereupon filed a motion that they be admitted to prosecute the action. Whether this motion should be allowed depended, of course, upon the law of Costa Rica, under the familiar rule that the survival of a cause of action is determined by the law of the place where it arose.

Patton v. Brady, 184 U. S. 608, 612.
Michigan Central Railroad v. Vreeland, 227 U. S. 59, 67.

It is also plain that at common law such a cause of action would not survive, so that the administrators were not entitled to come in unless the survival of the action under Costa Rican law were affirmatively established.

Panama Railroad v. Rock, 266 U. S. —; Adv. Ops. 1924-25, 63.

As appears by the annexed affidavit, the petitioner at the time the motion was filed believed that under the law of Costa Rica the cause of action survived and, therefore, did not oppose the motion, which was allowed on January 31, 1924. The petitioner has now learned that its previous understanding was erroneous and that, in view of the plaintiff's leaving no relatives in the direct lines of ascent or descent, the cause of action died with him, so that the whole foundation upon which the case has proceeded since his death has been fictitious. If the judgment of the District Court is not affirmed, therefore, the mandate should be so phrased as to leave open to the petitioner the right to move in the District Court that the order admitting the administrators as parties be vacated and the action dismissed.

The petitioner, therefore, prays that the opinion rendered herein be withdrawn and a further hearing granted, but that, if such further hearing be not granted, the mandate shall provide that final judgment shall not be entered in favor of the plaintiffs in error if the petitioner shall,

within such time as the court may designate, file in the District Court a motion for the correction of the bill of exceptions by setting out the above-mentioned testimony of Ramsay and a motion that the order admitting the administrators to prosecute the action be vacated and shall further provide that, if one or both of said motions shall be allowed, such judgment or other final order as the District Court may deem proper may be entered.

Northern Railway Company, by its Attorneys,
Robert G. Dodge, John M. Raymond.

I, Robert G. Dodge, of counsel for the above-named petitioner, certify that I have examined the foregoing petition and that in my opinion the said petition is well-founded and meritorious and is entitled to the consideration of the court.

Robert G. Dodge.

United States of America,
District of Massachusetts, ss:

Boston, February 6, 1925.

I, Cecil B. Taylor of Brookline in the Commonwealth and District of Massachusetts, depose and say as follows:

1. I am treasurer of the above-named petitioner Northern Railway Company and have been such since April 12, 1921.

2. At the second trial of the present action (May 2, 1923) Joseph Ramsay, who was conductor of the train in question, was called as a witness by the defendants and testified on direct examination as follows:

"Q. Now, when this special train appeared in sight what did you do?

"A. I flagged this special down somewhere near where my engine would be, or a little up about midways of my train, and advised the engineer and conductor that they would likely find Torito bridge obstructed by revolutionists.

"Q. You knew there were troops on that train, government troops?

"A. At that time, yes, sir.

"Q. Was there anything in the way of armed men on your train?

"A. No, sir.

"Q. Any appearance of hostility to this advancing troop train?

"A. None.

"Q. Was it light?

"A. Yes, sir.

"Q. Women and children looking out of the windows?

"A. Yes, sir.

"Q. Were the windows open on the car?

"A. Yes, sir.

"Q. Did you anticipate any danger in passing that troop train?

"A. None whatever.

"Q. Now, after you had warned the engineer and the conductor of the obstruction of the bridge at Torito, did any of the armed men, any of the troops get off the train?

"A. When I advised this train I started to pull out, and when they—they were moving slow themselves, and the officer dismounted and asked what train we had. I advised him that we had the regular passenger train from San Jose to Limon.

"Q. Did you know that officer?

"A. Personally I didn't know him, no, sir.

"Q. Know him by sight?

"A. I knew him from traveling up and down the line occasionally.

"Q. He had travelled on your trains?

"A. Yes, sir.

"Q. He asked you what the train was?

"A. Yes, sir.

"Q. And I think you have told us what you said by way of reply?

"A. I advised him that it was the passenger train from San Jose to Limon, and that there were no revolutionists on board.

"Q. Did you see another officer also get off?

"A. There was another officer got off also.

"Q. Did you see Mr. Veitch talking to him?

"A. Mr. Veitch was standing a little behind me. I heard some talking, yes, sir.

"Q. Between him and the other officer?

"A. Yes, sir.

"Q. Now, at the time when you made that statement to the officer that it was the regular passenger train without any revolutionists on it, were the trains standing still, or moving then?

"A. The trains were moving slowly in the opposite direction, and after this talk he halted—he says, "Stop", halted the train, and I gave the signal to my engineer and he stopped. Meantime the troop train pulled up just a little ways, and at this moment I heard someone holler, 'Fire!'

"Q. In Spanish?

"A. Or 'Fuego!' Yes, sir.

"Q. By the way, was your conversation with this man in Spanish?

"A. Yes, sir.

"Q. His language?

"A. Yes, sir.

"Q. Would you say that at the time when you heard the order to fire given the troop train was stopped as well as your train?

"A. The troop train was just about stopped. Probably it was moving slowly.

"Q. It didn't stop immediately, did it?

"A. It didn't stop immediately, no, sir.

"Q. Can you tell us who it was that gave that signal to fire?

"A. I can't tell which one gave it.

"Q. Was it one of the two who were on the ground there?

"A. It was either one or the other, but I couldn't say just now which one; but at any rate one of them pulled his sword out of the holster and held it up and at this instant I heard somebody shout 'Fuego!'

"Q. Now, up to that moment had anything whatever occurred to lead you to anticipate the slightest danger?

"A. None whatever."

On cross-examination the witness testified as follows:

"Q. Now, when you got to La Pascua you say the commander or some officer said to you, 'What train is this?'

"A. Yes, sir.

"Q. And you say there was no other train on the road at that time as far as you knew going east or west but yours?

"A. Except the troop train and the one that I was on.

"Q. So he asked you, 'What train is this?'

"A. Yes, sir.

"Q. And you told him that there were no revolutionists on the train?

"A. I did.

"Q. And you heard Mr. Veitch, you say, state to him that there were no revolutionists on the train?

"A. Yes, sir.

"Mr. Dodge: State to whom?

"Mr. Perkins: To the commander.

"Q. Well, to whom did Mr. Veitch speak?

"A. He was speaking to one of the officers in uniform on the ground.

"Q. And you overheard him?

"A. Yes, sir.

"Q. And was it something like this, 'I tell you, man, there are no revolutionists on this train'? Was that what he said?

"A. Now, as I saw Mr. Veitch he was talking to this officer.

"Q. Can you tell me whether that was what he said, 'I tell you, man, there are no revolutionists on this train'?

"A. I don't remember the exact words, the exact expression of Mr. Veitch."

3. Upon the filing of the bill of exceptions, the defendants' counsel represented to the plaintiff's counsel that its form was exceedingly confusing and unsatisfactory and urged that it be revised so as to state the testimony of the several witnesses seriatim in the usual way, but the plaintiff's counsel refused to make any such revision or to consent thereto. The defendants finally suffered the bill to be allowed in its present form, believing that this court would in this particular, as generally, follow the practice of the

courts of Massachusetts, so that, with respect to their contention that no evidence warranting the submission of the case to the jury had been introduced, they would not be prejudiced by the failure to state the testimony in a consecutive form.

4. The defendants, upon being informed that the plaintiff had died and that the administrators of his estate desired to come in to prosecute the action, caused careful inquiry to be made as to whether by the law of Costa Rica the cause of action survived and in particular submitted the question to one of the leading members of the Costa Rican bar who rendered a written opinion to the effect that by the law of Costa Rica the cause of action survived in favor of the "heirs" of the plaintiff. The defendants at the time had no knowledge that the plaintiff died without such heirs as would be entitled to the plaintiff's estate under Costa Rican law. The plaintiff's counsel had made no attempt to show what heirs survived the plaintiff. Upon the assumption that such heirs existed and in reliance upon the opinion of the eminent Costa Rican attorney above referred to the defendants did not oppose the motion of the administrators for leave to be admitted to prosecute the action but suffered the same to be allowed. After investigation the defendants, upon information and belief, are now of the opinion that the plaintiff died without relatives in the direct line of ascent or descent, in the absence of which relatives a cause of action like that now in question does not survive under Costa Rican law, the word "heirs" being used to mean such ascending or descending relatives. The defendants are prepared to show both by references to the statutes of Costa Rica and by the opinion of duly qualified experts that under the law of Costa Rica a cause of action like the one in question survives only to direct ascending or descending relatives. They are also prepared to show that the burden of proving the existence of such relatives is upon those asserting the right of survivorship. If the defendants had, prior to the action of the District Court upon this motion of the administrators, been in possession of the information they now have and believe to be true to the effect that the plaintiff died without ascending or descending relatives, they would have opposed this motion and placed upon

the administrators, where it rightfully belonged, the burden of showing that the original plaintiff herein, Michael B. Ryan, did have at the time of his death such relatives, since, in the absence of such proof, the cause of action upon which this suit is based would have lapsed with his death.

Cecil B. Taylor.

Personally appeared the above-named Cecil B. Taylor and made oath that the foregoing affidavit by him subscribed is true to the best of his knowledge, information and belief, before me.

John L. Warren, Notary Public.

(4201)

Supreme Court of the United States.

OCTOBER TERM, 1926.

[No. 136.]

NORTHERN RAILWAY COMPANY,
Petitioner,

v.

DONALD PAGE ET AL., ADMINISTRATORS.

BRIEF FOR THE PETITIONER.

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Supreme Court of the United States.

OCTOBER TERM, 1926.

No. 136.

NORTHERN RAILWAY COMPANY, PETITIONER,

v.

DONALD PAGE ET AL., ADMINISTRATORS.

BRIEF FOR THE PETITIONER.

This case is here on a writ of certiorari to the Circuit Court of Appeals for the First Circuit. The decision to be reviewed is reported in 3 Fed. (2d) 747.

The action was begun on January 5, 1921, in the United States District Court for the District of Massachusetts by Michael B. Ryan (hereinafter referred to as the plaintiff) against the United Fruit Company and the Northern Railway Company to recover for injuries received by him in Costa Rica on February 23, 1918, while a passenger on a train on the line of the Northern Railway, alleged to have been operated by both defendants. In the District Court a verdict was ordered in favor of the United Fruit Company (R. 7), and the plaintiff alleged exceptions, but these exceptions were waived in the Circuit Court of Appeals (R. 92), so that no question as to the liability of that company now arises. The Northern Railway Company will, therefore, be referred to as the defendant.

The accident happened in an extraordinary manner. On the previous day a small local insurrection had broken out in a part of Costa Rica west of San Jose, the capital.

The train on which the plaintiff was travelling was the regular morning passenger train running from San Jose in an easterly direction to Port Limon on the coast. It was held up at Turrialba, a way station about sixty-five miles from Port Limon, by "insurrectos," who detained it for some hours and finally allowed it to depart. In the meanwhile a train containing Costa Rican government troops had been sent up the line from Port Limon. It passed the other train at La Pascua, the latter standing on a siding. Although the passenger train had no insurrectionists on board, and the officers in charge of the troops were so informed, and although there was nothing about its appearance to arouse suspicion, and on the contrary women and children and other passengers could be plainly seen at the windows, the officers of the troops gave the order to fire when the trains were alongside and only a few feet from each other, whereupon a fusillade of firing began and several passengers were killed, and many others, including the plaintiff, seriously wounded.

The government of Costa Rica, recognizing its liability, although purporting to deny it, paid the plaintiff $10,000 in settlement of his claim.

At the first trial the jury disagreed. At the second trial the jury found for the plaintiff against the Northern Railway Company in the sum of $25,000. They returned, however, an alternative verdict for the defendant in the event that it should be determined that as matter of law the plaintiff was not entitled to prevail (R. 9). Thereafter, upon motion of the defendant, District Judge Morton, who had presided at the trial, ordered that the verdict for the plaintiff be set aside and the alternative verdict for the defendant be entered, on the ground that there was nothing in the evidence on which a finding of negligence on the part of the defendant could be supported (R. 10, 81-82).

Subsequently the plaintiff died, and on January 31, 1924,

his administrators, the present respondents, were admitted as parties plaintiff (R. 10). They took the case on writ of error to the Circuit Court of Appeals, and that court (Johnson, Circuit Judge, dissenting) held that the verdict for the defendant should be set aside and the case remanded to the District Court with directions to enter a verdict and judgment for the plaintiffs (R. 85-94).

Shortly thereafter the defendant presented to the Circuit Court of Appeals a petition for a rehearing, or for a modification of the mandate in order that there might be presented to the District Court certain newly discovered evidence, stated in an accompanying affidavit, tending to show that under the law of Costa Rica the cause of action did not survive the death of the plaintiff (R. 102-115). The Circuit Court of Appeals denied this petition. So far as concerns the question as to the survival of the action the decision of the court went on the ground that survival depended upon the law of the forum (Massachusetts), and not upon the law of Costa Rica, and that by the law of Massachusetts the action survived (R. 94-95).

This court was asked to grant a writ of certiorari on three grounds; viz.:

1. Because, while the federal authorities are conflicting and undecisive on the question as to what law determines the survival of a cause of action like this, the weight of authority in the state courts is opposed to the decision of the Circuit Court of Appeals; and even if the decision of that court that the law of Massachusetts governs is correct, it wrongly interpreted the law of Massachusetts.

2. Because the ruling that the effect of the settlement with the government of Costa Rica must be determined by Costa Rican law is opposed to the decisions of this court and the Supreme Court of Massachusetts.

3. Because the judges below were equally divided upon the question whether there was sufficient evidence of neg-

ligence to warrant the submission of the case to the jury, and it should have been determined that there was no sufficient evidence.

It is on these grounds that it is now urged that the decision of the Circuit Court of Appeals should be reversed and judgment ordered for the defendant. The points will be discussed in reverse order, and the defendant's argument may be summarized as follows:

I. There was no sufficient evidence of negligence on the part of the defendant to warrant the submission of the case to the jury.

II. The effect of the settlement with the government of Costa Rica is to be determined by the common law, and by that law the settlement is a bar to the present action.

III. The ruling of the Circuit Court of Appeals as to the survival of the action was wrong, for—

1. The survival of the action depended upon the law of Costa Rica.

2. If the survival of the action depended upon the law of Massachusetts, it abated on the plaintiff's death.

Argument.

I.

There was no sufficient Evidence of Negligence on the Part of the Defendant to warrant the Submission of the Case to the Jury.

The only evidence as to the standard of care imposed by the law of Costa Rica upon a common carrier was furnished by Dean Pound of the Harvard Law School, who was called as a witness by the plaintiff and who testified that under Costa Rican law a railway company is liable only for a failure to exercise ordinary care, there being no rule requiring a carrier to exercise a high degree of care toward its passengers; that a corporation is not liable under that law for the negligence of any agent, but only for that of a

"representative" of the company, that is to say, "the person who is in charge immediately of the operation"; and that in order to establish liability for the acts of subordinates of a representative it must be shown that the company has not chosen a competent and reasonable person for the position or has not supervised his conduct with due diligence (R. 56).

Counsel for the plaintiff conceded that he had no case unless the defendant *knew* that the government troops had reasonable cause to believe that the train upon which the plaintiff was a passenger was transporting armed enemy forces, and with that knowledge neglected to take precautions which it should have taken (R. 63; and see the plaintiff's declaration and specifications, R. 3-7). The case was submitted to the jury on these issues (R. 68).

There was little, if any, conflict in the testimony concerning the substantial facts.

The plaintiff left San Jose on the 8 a.m. regular daily passenger train due at Port Limon at 4.30 p.m. The train was composed of an engine, five freight cars, a combination baggage and second-class passenger car, one or two first-class coaches, and a pay car containing gold and silver currency and express parcels. The conductor in charge was one Ramsay, and he and the other members of the train crew were regular employees of the defendant. The passengers consisted of "the usual persons"—men, women and children, some being natives and some foreigners (R. 12-13).

The train arrived at Turrialba at about 11.30 a.m. without incident. It was there boarded by a band of insurrectos, who took possession of it and searched for persons connected with the government. With the exception of one person who was taken on suspicion, the passengers were unmolested. The train was detained for some hours while the insurrectos took the engine and travelled on it toward

San Jose for the purpose of destroying tracks. Finally, late in the afternoon, the train was allowed to proceed. As it was starting from Turrialba a revolutionary officer ordered several of his men to go on the train to blow up a bridge at Torito, two miles down the line, and certain insurrectos thereupon jumped on board, some armed with guns and other weapons, and others with picks and shovels. All of them left the train at Torito, and the train proceeded to Peralta, four or five miles further down (R. 13).

At Peralta conductor Ramsay received a message from the defendant's officials at Port Limon to pass a special train at La Pascua, which was five or six miles from Peralta, no informtion being given him that the train was carrying troops (R. 14). The train referred to had been dispatched from Port Limon at about 3.30 p.m., carrying government military troops, who were ordered to Turrialba to meet the rebels (R. 13). At Las Lomas, about forty-three or forty-four miles from Port Limon, shortly after 5.30 p.m., the troop train received orders to pass an "extra" or "special" train at La Pascua, about six miles away (R. 14).

The troop train arrived at La Pascua a few minutes after the arrival of the passenger train at that place (R. 14).

The railroad was a single-track line between Port Limon and Turrialba, with sidings at La Pascua and other points. There was a train dispatcher's telephone line from the head office of the defendant railway at Limon to various stations along the line, but from any given way station one could communicate by this telephone only with Limon, and not with other way stations. There were also a railway telegraph line and a government telegraph line (R. 30, 54, 87).

"When the locomotive of the troop train arrived opposite the combination baggage and passenger car, Ramsay flagged it and told the engineer to look out for the Torito bridge where he had left revolutionists, that he

would probably find it torn up. Two officers then alighted from the troop train and one said to Ramsay 'What train is this?' to which he replied that it was the regular passenger train from San José to Limon. He told the officer in English and then in Spanish that there were no revolutionists on board. Ramsay testified that he knew the officer by sight as he had traveled on his train before. At the same time the other officer was speaking to one Veitch, who testified at the trial for the defendant. He asked Veitch what the train was, and Veitch replied that it was the passenger train from San José to Limon, and that there were no revolutionists on board. Veitch had been an importer and banana grower in Costa Rica for eleven years prior to 1918, and was then consular agent for the Italian Government. Ramsay then signaled his train to proceed, the officers demanded that it be halted, which was done. The troop train then began to move forward, the officers walking beside it. When the passenger cars of the troop train were approximately opposite the passenger coaches of the passenger train, and while the troop train was still in motion, although coming to a stop, one of the officers raised his sword and waved it and an order to fire was given. Immediately the firing began by the troops, some kneeling in the car with their guns extending out of the windows about three feet, and some on the platforms'' (R. 15).

(This paragraph is either testimony of Grant, the plaintiff's witness, or a statement of undisputed facts, like several other statements which appear in the bill of exceptions. It would seem that it must be taken as a statement of facts, as part of it, at least, is obviously not testimony of Grant.)

There was nothing in the evidence in any way contradicting the statements in this paragraph, yet the opinion of the majority of the Circuit Court of Appeals is in large part based on the assumption that the jury might properly

have found that the facts were not as therein stated. Judge Bingham said (R. 90-91):

> "The record does not show that Ramsay testified as to what he said to the officers of the troops, but it does appear that he testified that 'when the firing began he hollered several times to the troops that they were firing at passengers, that there were no revolutionists on board.'
>
> "It is evident that the troops and their officers believed that the passenger train contained revolutionists—otherwise it is practically impossible to account for their action—and the jury might have found that, inasmuch as Ramsay, the conductor, did not testify as to what he said to the officers in charge of the troops prior to the shooting but did testify that when the shooting began he cried out that there were no revolutionists on the train, nothing of the kind was said until after the shooting began; that the troops and their officers never received any information as to the harmless character of the occupants of the train or received it too late and under such circumstances as to render it unavailable."

This statement was made in the face of the fact that the bill of exceptions obviously contained only stray bits of Ramsay's testimony, and naturally would not contain all the evidence favorable to the defendant; and Judge Bingham wholly disregarded, not only the above-quoted paragraph of the bill of exceptions, but also the fact that in charging the jury Judge Morton assumed as an undisputed fact that when the trains were stopped the officers of the troops were informed by Ramsay and Veitch that there were no revolutionists on the train (R. 67).

If no evidence warranting a finding that Ramsay failed to give notice to the troop train was produced by the plain-

tiff, there was nothing for the defendants to meet, and, if they omitted to offer his testimony on this point, the fact was of no significance. Indeed, a party's failure to produce evidence never constitutes independent proof of any fact; it simply raises an inference that he is not in a position to contradict such affirmative evidence as the other party may have introduced on the subject in question.

Owens Bottle-Machine Co. v. *Kanawha Banking & Trust Co.* (C.C.A. 4th Circ.), 259 Fed. Rep. 838.
W. F. Corbin & Co. v. *United States* (C.C.A. 6th Circ.), 181 Fed. Rep. 296.
Porcino v. *DeStefano,* 243 Mass. 398.
Stimpson v. *Hunter,* 234 Mass. 61.
Poirier v. *Terceiro,* 224 Mass. 435.
Tully v. *Fitchburg Railroad,* 134 Mass. 499.

Even when it was pointed out in the petition for a rehearing that Ramsay's testimony on this point was omitted from the bill of exceptions as having been favorable to the defendant and having no tendency to sustain the plaintiff's case, and that in point of fact he had testified unequivocally that before the shooting he told the officer that there were no revolutionists on board, the court said (R. 95):

"As to enlarging the record, we will say that we have examined the affidavit attached to the defendant's application and said to contain the omitted testimony; that it there appears that Ramsay testified that what he said to the officers of the troop train—'that his train was the regular passenger train, without any Revolutionists on board'—was not said until after the trains were moving past one another, and that the order to the troops to fire was given at substantially the same time and while the troop train was still moving along. If the record were enlarged as desired, we

are of the opinion that it would not alter the conclusion reached in our decision of January 6."

It is submitted that this indicates a complete misapprehension of the testimony of Ramsay as stated in the affidavit (R. 110-113), that it is inconsistent with the plaintiff's own testimony as to the place and time of the conversation between Ramsay and the officer (R. 17, 28), and that it exhibits a fundamental error which should lead to a reversal of the judgment.

The witnesses for the plaintiff with regard to the circumstances of the accident were two—the plaintiff himself, and Grant, a fellow-passenger.

Grant testified that "when the cars came close enough you could see guns sticking out of the window in perfect alignment, and see troops standing on the steps, so that I believe somebody on the ground, Mr. Ramsay or Mr. Veitch or somebody else there, mentioned that it was a troop train going up to attack these revolutionists" (R. 14-15); that he heard Ramsay tell one of the officers that the train was the regular passenger train and had no revolutionists on board, that Ramsay said it in Spanish, and that he also heard Mr. Veitch say substantially the same thing to the other officer. "It was one of the officers who started that firing just after being told that it was the passenger train" (R. 16); that, although it was dusk at the time, there was good visibility up to 200 feet; that you could see at least that distance (R. 18); that the train was almost stopped when the shooting began, and standing still when the bulk of the shooting was done; that the shooting lasted only about sixty seconds (R. 20).

He further testified that there were women and children in the car where the plaintiff was; that the windows were largely open; that, when the troops fired, the passenger train was about six or eight feet from them, and that

women and children were looking out of the windows; that he, the witness, was standing on the ground between the tracks, having no weapon nor anything that looked like one, and that men on the steps of the car aimed at him and shot off his garter; that whoever fired at him could see him plainly enough (R. 29).

"The witness further testified on cross-examination that down to the time that the officer waved his sword and some one called 'Fuego' there was nothing whatever in the appearance of the passenger train or the passengers to indicate there were revolutionists there. It was just an ordinary passenger train with no show of a gun or of hostility. The troops on the troop train were regular government troops, not revolutionists. It was easy enough to look into the troop train and see some of the men standing behind the others. At the moment the firing started there were some people sticking their heads out of the windows of the passenger train.

"I have a recollection of one woman who was later shot having her head out of the window. I don't remember at this moment any children, but I presume there were at the time.

"The witness further testified on cross-examination, that after the accident he confirmed Mr. Veitch's statement that there were men, women and chillren leaning out of the windows of the passenger train and that that was probably accurate. He also testified that thirteen or fourteen passengers were injured, of whom four were killed" (R. 29-30).

The plaintiff testified that at the time of the shooting it was light enough so that one could see a considerable distance; that when the troop train stopped, with its engine about opposite that of the passenger train, he could see Ramsay up forward apparently talking to the general in charge of the troops; that that was perhaps 200 feet from him, and it was light enough so that he could dis-

tinguish Ramsay and the generals; that the women and children in the car were plainly visible and the troops could see just what they were firing at (R. 17).

He further testified that when the train left San Jose everybody thought "that such little insurrection as there was, was over on the other side of the capital city"; that as a matter of fact he understood that the insurrection lasted less than a week. "Q. So that this thing that occurred down here where you were injured was a thing that of course was not anticipated by anybody? A. No, I should say not. . . . Q. And you have no reason to believe that anybody knew before you got to Turrialba that there were revolutionists there? A. No" (R. 21).

He further testified that Ramsay had been a conductor for a great many years on this railroad and was very well liked and very well known in Costa Rica; and that while they were held up at Turrialba he anticipated no injury to himself or any of the other passengers (R. 23); that when the train was finally released and started down he noticed that some of the rebels jumped on the train, the leader saying that they were going down to destroy the Torito bridge (R. 25); that he understands that they all got off at Torito and that thereafter the train was "merely an ordinary passenger train going down"; that when the train got to La Pascua it took a siding to the right and stopped; that some of the passengers got out and were walking around; that he did not hear what Ramsay said to the officer in charge of the troops (R. 25-26); that the troop train then pulled up so that it was beside the passenger train; that this was after they had stopped first, with the engines opposite; that the passenger train contained women and children and there was nothing about it different in appearance from any passenger train; that there was no sign of armed men about; that the troops fired from a distance of six or eight feet; that it was warm weather and nearly all of the windows of the car were open; that there had not been any sign of hostility

on the part of the troops to anybody in the plaintiff's car; that there were a good many women and children in the car; that he would say that some of them were looking out of the windows; that Ramsay and the officer may have been talking together for some time; that no one showed any sign of alarm and that he saw nothing done by anybody in the train which could have caused the troops to think there was any hostility to them (R. 27-28). "Q. So that these troops lined up in this car opposite fired this volley right into the women and children in your car? A. Yes, fired right in the windows. Q. There hadn't been any sign of hostility on the part of those troops to anybody in your car, had there? A. Not at all. Q. Nothing about it to indicate that it was anything other than what it was, namely, an ordinary passenger train? A. That is true" (R. 27).

This is the substance of the plaintiff's case, and obviously it contains no evidence of negligence. It merely shows an extraordinary occurrence which could not possibly have been foreseen.

Under the law of Costa Rica, the defendant can be held liable only if there was a lack of ordinary care on the part of a "representative" of the company, as it is not claimed that the defendant had failed to choose competent and reliable persons for subordinate positions or had failed to supervise their conduct with due diligence. The only "representatives" were Chittenden or Ramsay. The question appears to come down to this: Did the defendant's evidence contain anything which would justify a finding of negligence on the part of Ramsay or Chittenden?

The defendant's witnesses, as to the occurrence itself, were Ramsay and a passenger named Veitch. The brief extracts from the testimony of Ramsay which are included in the bill of exceptions do not purport to cover all his

testimony regarding the occurrences, and do not furnish the slightest evidence of want of care on his part (see R. 14, 19, 20, 40-41, 44, 53). Nor does the very brief extract from the testimony of Veitch add anything to the plaintiff's case (R. 15).

It appears from the bill of exceptions that Veitch had been an importer and banana grower in Costa Rica for eleven years, and, at the time of the occurrences in question, was Consular Agent for the Italian government; that when the troop train had been flagged and had stopped and Ramsay was talking to one of the officers, Veitch talked with the other, and, in reply to his question as to what the train was, told him that it was a passenger train from San Jose to Limon, and that there were no revolutionists on board.

"Q. And did you hear any signal or order given by anybody?

"A. I saw one of the officers, the man I had been speaking to, raise his sword in the air and shout something. A military order is always difficult to understand. I didn't hear the exact word he gave.

"Q. Did the firing begin immediately?

"A. Immediately. He was evidently understood on the troop train. * * *

"Q. What did you do?

"A. I stood there until I saw them pointing their guns at me and then I dived under the train.

"Q. And did you get hit or any part of your clothing?

"A. Yes, they put a bullet across the seat of my trousers and split it open; put another bullet through my clothes here, and two bullets through my valise and one through a bag I had in my hand. 'I saw a man named Betty killed.' * * * He was in front of our coach. * * * I saw a man shove the gun about as

close as I am to this gentleman here—the muzzle of the gun was about two feet from him. He was leaning out of the window like, or leaning over here" (R. 15).

The defendant's other witnesses were Chittenden, the general manager, and certain of his subordinates, all of whom were stationed at the office of the defendant at Limon and who testified as to the information which came to them of the seizure and release of the passenger train and what they did with reference to the matter.

In the opinion of the majority of the Circuit Court of Appeals it was permissible for the jury to find that the railroad officials at Limon ought to have anticipated that the officers in charge of the troops "might understand that the oncoming passenger train contained armed enemy forces, unless informed by the governor and those in charge at Limon that no enemy forces were on the passenger train," and that no such warning was given (R. 90). It is submitted that there is no justification for these conclusions or any portion thereof.

There was evidence that those on the troop train knew that the passenger train had been held up at Turrialba for a while and then allowed to depart (R. 47, 50-51). But there was no evidence that any information had come to them tending to show that rebels were on the train, or even that some had travelled on it as far as Torito. When the railroad officials at Limon were advised that the rebels had allowed the train to proceed, no information came to them suggesting in any way that any armed men had jumped on the train, or that the officers in charge of the troops might think there were any on the train. The fact that certain rebels had travelled two miles on the train was known at Limon only when Ramsay telephoned from Peralta. The insurrection was a small one, originating in the west, and it would seem most unlikely that a band of rebels would leave their base and proceed rapidly by rail toward the

very region where they must have known there would be government troops. There was, besides, affirmative evidence that the troops were notified before they met the passenger train that it had no revolutionists on board (R. 50).

Even if all the testimony of the defendant's witnesses as to the steps which were taken to give information to the troop train was disbelieved, this does not furnish affirmative evidence that there was a failure to take proper precautions.

It appeared that under the law of Costa Rica, in case of war or internal discord, the government may take over the control of a railroad (R. 57), and that on the day in question, after the seizure of the train at Turrialba, all train movements were directed by the governor (R. 31, 34, 36; and see Judge Morton's statement to the jury, R. 71). The officials of the road were in constant communication with the governor during the day.

Chittenden, the defendant's general manager, testified that upon receipt of information that the passenger train had been captured at Turrialba he informed the governor and the minister of war, and the governor stated that "he would instruct me when and how to proceed with the operation of train service until further notice" (R. 31); that, when he learned that the revolutionists were ready to release the train, he informed the governor and the latter instructed him to move the passenger train (R. 32); that he reminded the governor that there was a troop train on the line and told him he had better notify it; that the governor said he would and afterwards "said he did"; and that he, Chittenden, personally telephoned the yard master at Siquirres to get word to the conductor of the troop train that the passenger train was carrying non-combatants, including women and children (R. 47-49).

Marsh, the defendant's superintendent, testified that he

notified the governor of the detention of the passenger train; that the government officials later requested a troop train, which was dispatched from Limon at about 3.30 p.m. (R. 33); that later (about 5 o'clock, R. 46) he notified the governor of the release of the passenger train and asked authority to move it to Limon, and got such authority; that no trains were moved during the five days of the insurrection without authority from the government; that the government authorities used the railroad's telephone and telegraph lines during this period (R. 34-37).

Dingledine, assistant train dispatcher, testified that he came on duty at 5 o'clock on the afternoon of the day in question; that the governor was at the railroad office most of the time thereafter, in and out; that the governor was using the railroad's telephone line (R. 39); that he, Dingledine, received word from Ramsay about 5.15 that the train had been released by the rebels (R. 45, 50); that nothing was said about any revolutionists having jumped on the train; that the next message from Ramsay was from Peralta, informing him that all the rebels had got off the train at Torito to destroy a bridge; that this was the first information he had that any revolutionists had been on the train; that he then communicated with the troop train at Las Lomas, sending the conductor a message that the other train had no revolutionists on board, and giving orders to pass it at La Pascua (R. 50); that previously, when the troop train was at Siquirres, he had notified the conductor that the passenger train had been released and that "meet orders" would be given later (R. 51).

It is submitted that, whether the foregoing testimony of the defendant's officials was believed or disbelieved, it furnishes no affirmative evidence that the railroad officers knew or ought to have known that the officers of the troops had reasonable cause to believe armed forces were on the

passenger train at Turrialba, and with that knowledge neglected precautions which they ought to have taken.

It is further submitted that, even if it could be said that there was evidence of knowledge and a failure to take some precaution, there is no evidence that such failure in any way caused the accident. If the statements made to the officers of the troops at La Pascua by Ramsay and Veitch were not believed, and if the officers did not credit even the evidence of their own eyes, which should have established the harmless character of the train, surely no consideration would have been given by them to a telegraph or telephone message received from Limon, transmitting hearsay information of the condition of the passenger train at some point above La Pascua. If there was any failure on the part of the defendant to send such a message, it could not reasonably be found to have been a cause of the plaintiff's injuries.

At the most it remains in the highest degree speculative and conjectural whether any possible communication by the railroad to those in charge of the troops would have prevented the occurrence.

In *St. Louis-St. Francisco Ry. Co.* v. *Mills,* 271 U.S. 344, where the administratrix of an employee of a railway company who was killed by strikers sued the company and claimed that it was negligent in failing to furnish more than one guard, this court said, by Mr. Justice Stone (at p. 347):

> "Nor is there evidence from which the jury might infer that petitioner's failure to provide an additional guard or guards, was the proximate cause of decedent's death. Whether one or more additional guards would have prevented the killing is in the highest degree speculative. The undisputed evidence is that the shooting was done by one or more of three men stand-

ing on the rear platform of the car. They had come there after decedent and his companions had seated themselves in the car. Without warning they fired a volley into the car, and fled. Decedent and his guard were armed, but had no opportunity to defend themselves. On such a state of facts the jury should not have been permitted to conjecture what might have happened if an additional guard had been present."

See also *Chicago, M. & St. P. Ry. Co.* v. *Coogan*, 271 U.S. 472, 478.

In view of the fact that the officers of the troops disbelieved Ramsay and Veitch and were not led to put faith in what they said by the innocent appearance of the train, the mere fact of the shooting furnishes no evidence that the officers had not been informed from Limon that there were no revolutionists on the train, for they may well have received such information and failed to believe it. The majority of the Circuit Court of Appeals, it is submitted, fell into error in holding that the action of the troops was itself evidence of a failure to inform them of the harmless character of the occupants of the passenger train (R. 19).

The whole extraordinary affair was one which no one could possibly have foreseen. It is only when the act of a third person could have been foreseen as a probable consequence of a defendant's act or omission that the damage caused by the third person can be imputed to the defendant.

Scheffer v. *Washington City &c. R.R. Co.*, 105 U.S. 249.

Milwaukee &c. Ry. Co. v. *Kellogg*, 94 U.S. 469.

American Bridge Co. v. *Seeds* (C.C.A. 8th Circ.), 144 Fed. Rep. 605.

Jarnagin v. *Travelers Protective Association* (C.C.A. 6th Circ.), 133 Fed. Rep. 892.

Cole v. *German Savings & Loan Society* (C.C.A. 8th Circ.), 124 Fed. Rep. 113.

It is submitted that Judge Morton was right in saying (R. 82):

> "Sometimes negligence can be inferred from the mere fact of the accident. But this is not such a case. It devolves upon the plaintiff to offer evidence of some negligent act or omission by the defendant which caused his injury. I am unable to discover in the evidence anything on which a finding of negligence can be supported or to say, even after the event, in what the defendant's agents and servants failed. The jury might, of course, reject the testimony of the defendant's witnesses; but that would not supply evidence of negligence on the defendant's part.
>
> "The attack took place, apparently, because the officers in command of the troops lost their heads and behaved with incredible folly. It was an extraordinary occurrence which the defendant had no reason to anticipate and for which it is not liable."

It is also submitted that Judge Johnson, in his dissenting opinion in the Circuit Court of Appeals, took the proper view of the case (R. 92-94).

It may be noted that the "alternative verdict" (R. 9), under the terms of which Judge Morton, or any court on appeal, was authorized to order a verdict and judgment for the defendant, was taken at his suggestion and without objection on the part of counsel (R. 63). The practice of taking such verdicts in appropriate cases is based on the Massachusetts statute (G.L. c. 231, § 120), which reads as follows:

> "When exceptions to any ruling or direction of a judge are alleged, or any question of law reserved, in the course of a trial by jury, and the circumstances

are such that, if the ruling or direction at the trial was wrong, the verdict or finding ought to have been entered for a different party or for larger or smaller damages or otherwise than as was done at the trial, the justice may reserve leave, with the assent of the jury, so to enter the verdict or finding, if upon the questions of law so raised the court shall decide that it ought to have been so entered. The leave reserved, as well as the findings of the jury upon any particular questions of fact submitted to them, shall be entered in the record of the proceedings, and if upon the questions of law it shall be decided, either by the same court or by the appellate court, that the verdict or finding ought to have been entered in accordance with the leave reserved, it shall be entered accordingly, unless the supreme judicial court, in accordance with section one hundred and twenty-two, one hundred and twenty-three or one hundred and twenty-four, makes a different order. When so entered, the verdict shall have the same effect as if it had been entered at the trial."

Alternative verdicts are frequently taken in the District Court for the District of Massachusetts, and the practice has been expressly approved by the Circuit Court of Appeals.

Automatic Pencil Sharpener Co. v. *Boston Pencil Pointer Co.*, 279 Fed. 40.

II.

The Effect of the Settlement with the Government of Costa Rica is to be determined by the Common Law, and by that Law the Settlement is a Bar to the present Action.

After the accident the plaintiff made a claim against the government of Costa Rica, and a settlement for the sum of

ten thousand dollars was agreed upon, the agreement being made in the United States (R. 57-59; Exs. C and D, R. 75-76).

In the letter of the Costa Rican minister (Ex. C), although liability was denied, the payment to be made was referred to as a "settlement" and it was stated that its purpose was "to indemniside you for the damage done"; and in Ryan's written acceptance of the offer (Ex. D) he said: "This sum pays the claim in full."

After six thousand dollars of the stipulated sum had been paid, the existing Costa Rican government was overthrown by an insurrection. The plaintiff took up the matter of the payment of the balance through the Department of State at Washington, and through that Department arrangements were made for the payment of the remaining four thousand dollars (R. 59-60; Exs. A and B*a*, R. 73-74). In his letter which closed the transaction (Ex. A), Ryan accepted the offer of the new government to pay the remainder of the original sum of ten thousand dollars "in settlement of my claim against it for physical injuries inflicted upon me by Costa Rican troops," and authorized certain persons in Washington to receive the money in his behalf.

The plaintiff testified in substance that in his negotiations with the Costa Rican minister he reserved, orally, his right to proceed against the Northern Railway Company (R. 59); and the defendant, while contending that such an oral reservation of rights would be of no legal effect, conceded that the jury would find that there was such a reservation (R. 64).

It appeared from Pound's testimony (R. 61) that under Costa Rican law the government can be sued for wrongs generally, and that, though the judgment is not enforceable by execution, it is analogous to a judgment of our Court of Claims, and is enforced in a similar way.

The Circuit Court of Appeals held that the effect of this settlement was to be governed by the law of Costa Rica, because the plaintiff's acceptance of the offer "was not to take effect until his acceptance reached the Costa Rican government" (R. 91). This shows that the court misapprehended the facts. The original settlement was made in the United States in August, 1918. The letters containing the offer and acceptance (Exs. C and D) were sent and received in this country, and there was no thought of the necessity of ratification or any other action by the Costa Rican government before the agreement should become binding. The supplementary agreement to pay the remaining four thousand dollars became a binding contract upon Ryan's acceptance, and while the first payment was not to be made until his acceptance should have been communicated to the Costa Rican government (Ex. A), this was merely a provision as to the time of performance of the agreement, and did not mean that the agreement of settlement was not to be immediately effective.

Furthermore, the real agreement of settlement was made in 1918, and the fact that the last four thousand dollars was paid in pursuance of a supplemental agreement confirming the terms of the former does not affect the situation. It is immaterial that a new government came into power in Costa Rica, as a result of insurrection, before the settlement was completely carried through.

Republic of Peru v. *Dreyfus Brothers & Co.*, 38 Ch. Div. 348.

1 Kent, Comm. 25.

1 Moore, International Law Digest, 249 *et seq.*, 334 *et seq.*

1 Halleck, International Law (4th ed.), 96.

The agreement of settlement was made in the United States and was to be performed here. The question whether

it had the effect of discharging the plaintiff's claim against the present defendant depends, therefore, upon the common law, and not upon the law of Costa Rica.

Suydam v. *Barber*, 18 N.Y. 468.
Reed v. *Girty*, 6 Bosw. 567.

It is submitted that by the common law the settlement with the Costa Rican government is a bar to the present action.

A settlement with one joint tort-feasor, although without a formal release under seal, discharges all the others.

Lovejoy v. *Murray*, 3 Wall. 1, 17.
The Beaconsfield, 158 U.S. 303, 307.
Knapp v. *Roche*, 94 N.Y. 329, 334.

This is true even if the alleged wrong-doer who settles the claim is not legally liable for the wrong.

Metz v. *Soule, Kretsinger & Co.*, 40 Iowa, 236.
Brown v. *City of Cambridge*, 3 Allen, 474.
Brewer v. *Casey*, 196 Mass. 384.
Casey v. *Auburn Telephone Co.*, 155 App. Div. 66.
Kirkland v. *Ensign-Bickford Co.*, 267 Fed. Rep. 472 (D.C. Conn.).

It is unnecessary to consider what the situation would be if the settlement had been made with a government which, like that of the United States, asserts an immunity to suits of every kind except as express provision is made to the contrary. There is, of course, no presumption that the rule is the same in Costa Rica (*Cuba R.R. Co.* v. *Crosby*, 222 U.S. 473), and the plaintiff's witness, who furnished the only evidence on the subject, testified, as has been stated, that by the law of Costa Rica the government is suable for wrongs generally (R. 61). Hence decisions like *Standard*

Oil Co. v. *Southern Pacific Co.*, 268 U.S. 146, have no application.

It is of no consequence that the defendant undertook orally to reserve his rights against the defendant at the time when he made his settlement with the Costa Rican government.

Muse v. *DeVito*, 243 Mass. 384, 389.
Boston Supply Co. v. *Rubin*, 214 Mass. 217, 221.
Tanana Trading Co. v. *North American T. & T. Co.* (C.C.A. 9th Circ.), 220 Fed. Rep. 783, 786.

III.

The Ruling of the Circuit Court of Appeals as to the Survival of the Action was wrong.

1. The Survival of the Action depended upon the Law of Costa Rica.

The ruling of the court on this point was made in its opinion denying the defendant's petition for a rehearing (R. 94-95). In that petition the defendant asked the court, *inter alia*, to modify its mandate so as to permit it to move in the District Court that the order admitting the administrators as parties be vacated and the action dismissed (R. 109-110). This request was based on newly discovered evidence as to the law of Costa Rica concerning the survival of actions, set forth in paragraph 4 of the affidavit of the defendant's treasurer which accompanied the petition (R. 114-115). From that affidavit it appears that the defendant did not oppose the motion of the administrators that they be admitted to prosecute the action, for the reason that it had received a written opinion from a member of the Costa Rican bar that the action survived in favor of "heirs" of the original plaintiff; and that later the defendant ascertained that under Costa Rican law the word "heirs" in this connection includes only relatives in the

direct line of ascent or descent, and that Ryan left no such relatives, so that in Costa Rica there would be no survival of the action.

The court denied the defendant's application for the modification of the mandate on the sole ground that the action survived under the law of Massachusetts, and that it was that law which governed, citing *Baltimore & Ohio R.R. Co.* v. *Joy, Admr.*, 173 U.S. 226, 228, and three cases in lower federal courts (R. 95).

It is submitted that this ruling was wrong and that the survival of the action depended on the law of Costa Rica.

The federal statute (Rev. Stat. § 955) merely provides that, upon the death of a party to a suit pending in a court of the United States, the executor or administrator may, "in case the cause of action survives by law," prosecute or defend the suit. Whether any particular cause of action survives is, therefore, to be determined in the same manner as if the question arose in a state court.

Patton v. *Brady*, 184 U.S. 608, 612.
Hatfield v. *Bushnell*, 1 Blatchf. 393.
Jones v. *Vanzandt*, 4 McLean, 604.

According to the weight of authority in the state courts, the survival of an action depends primarily upon the law of the place where the cause of action arose.

Whitford v. *Panama R.R. Co.*, 23 N.Y. 465.
Needham v. *Grand Trunk Ry. Co.*, 38 Vt. 294.
Mexican Central Ry. Co. v. *Goodman*, 20 Tex. Civ. App. 109.
O'Reilly v. *N.Y. & N. England R.R. Co.*, 16 R.I. 388.
Davis v. *N.Y. & N. England R.R. Co.*, 143 Mass. 301.

In the lower federal courts there has been some diversity of opinion.

In *Stratton's Independence, Ltd.*, v. *Dines* (C.C. Col.), 126 Fed. Rep. 968, 980, it was held that in an action for false representations made in England the law of that country governs the question of survival.

In *Van Choate* v. *General Electric Co.* (D.C. Mass.), 245 Fed. Rep. 120, it was held that, whether a cause of action arises under the common law or under the statute of a state, its survivorship is governed by the "lex loci."

In *Sanders* v. *Louisville & Nashville R.R. Co.* (C.C.A. 6th Circ.), 111 Fed. Rep. 708, a statutory right of action upon which suit was brought in another state was held to survive only if the statute so provides.

In *Martin* v. *Wabash R.R. Co.* (C.C.A. 7th Circ.), 142 Fed. Rep. 650, the law of the forum was held to govern where the action arose at common law, and not under a statute.

It may be observed that all rights of action arising in Costa Rica are based on the Costa Rican code, that is, upon statute; and that the present action is based on section 1045 of that code (R. 56).

The earlier decisions of this court are *Martin* v. *Baltimore & Ohio R.R. Co.*, 151 U.S. 673, and *Baltimore & Ohio R.R. Co.* v. *Joy*, 173 U.S. 226, the case relied upon by the Circuit Court of Appeals in the case at bar. The decision in the former case turned on a statute of the forum, West Virginia, which limited the authority of a local executor or administrator to prosecute actions in the courts of that state. In the latter case the statute of Ohio, where the action was brought, was construed as creating a new substantive right in favor of the personal representative of a plaintiff who died before final judgment, which right of action

was entirely distinct from the right of action of the original plaintiff.

Later decisions of this court are *Patton* v. *Brady,* 184 U.S. 608, and *Michigan Central R.R.* v. *Vreeland,* 227 U.S. 59.

In the first of these cases the defendant died during the pendency of the action, and the court said (at p. 612):

> "Congress has not speaking generally, attempted to prescribe the causes which survive the death of either party. * * * In the absence of some special legislation the question in each case must be settled by the common law or by the law of the state in which the cause of action arose."

So, in the *Vreeland* case, the court said (at p. 67):

> "The question of survival is not one of procedure, 'but one which depends on the substance of the cause of action'."

These statements are simply applications of the general rule that, "as the only source of * * * [the] obligation is the law of the place of the act, it follows that that law determines not merely the existence of the obligation * * * but equally its extent."

> Holmes, J., in *Slater* v. *Mexican Nat. R.R.,* 194 U.S. 120.

Upon this state of the authorities it is submitted that the survival of this action depends on the law of Costa Rica.

2. If the Survival of the Action depended upon the Law of Massachusetts, it abated on the Plaintiff's Death.

The Circuit Court of Appeals cited G.L. c. 228, § 1, as showing that by the law of Massachusetts the right of ac-

tion survived. The material part of this section reads as follows:

> "In addition to the actions which survive by the common law, the following shall survive: actions of replevin, tort for assault, battery, false imprisonment or other damage to the person, * * *."

It is the settled law of Massachusetts, however, that this statute does not apply to causes of action arising in another state and not surviving under the law of that state.

> *Davis* v. *N.Y. & N. England R.R. Co.*, 143 Mass. 301.
>
> *Higgins* v. *Central New England & Western R.R. Co.*, 155 Mass. 176.

And by the common law of Massachusetts actions for personal injuries do not survive.

> *Thayer* v. *Dudley*, 3 Mass. 296.
>
> *Kearney* v. *Boston & Worcester R.R. Corp.*, 9 Cush. 108.

It follows that here again the Circuit Court of Appeals fell into error.

The defendant contends, therefore, that, if it is not now entitled to an entry of judgment in its favor on one of the grounds discussed in the earlier sections of this brief, it is entitled to have the case remitted to the District Court for the taking of further evidence of the law of Costa Rica as to survival.

ROBERT G. DODGE,
JOHN M. RAYMOND

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925.

No. [redacted] 136

NORTHERN RAILWAY COMPANY,
Petitioner,

v.

DONALD PAGE ET AL., ADMINISTRATORS,
Respondents.

RESPONDENTS' REPLY TO PETITION FOR WRIT OF CERTIORARI.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925.

No. 529.

NORTHERN RAILWAY COMPANY,
PETITIONER,
v.
DONALD PAGE ET AL., ADMINISTRATORS,
RESPONDENTS.

RESPONDENTS' REPLY TO PETITION FOR WRIT OF CERTIORARI.

We have referred to the respondents throughout the brief as "plaintiffs". They are the administrators of the estate of M. B. Ryan, the original plaintiff, to whom we have referred by name. The action was begun against the petitioner for personal injuries received by Ryan in Costa Rica. We have referred in the brief to the petitioner as "defendant".

We have annexed to the brief, copies of certified copies of the records of proceedings in the District Court and the Circuit Court of Appeals, which took place *after the issue* of the mandate and are not included in the record accompanying the petition.

The petitioner has omitted to transmit to this Court with the record one of the plaintiffs' exhibits, which, as stated in the Bill of Exceptions (Rec. p. 17), is

> "A map, drawn to scale, showing the distances between the various points on the railroad and other physical conditions (which) was offered in evidence and marked 'Exhibit XX' and is made a part of this bill of exceptions."

HISTORY OF THE COURT PROCEEDINGS.

The trial of the action in the District Court for the District of Massachusetts came before Morton, J., with a jury. On May 3, 1923, the jury returned a verdict for the plaintiffs for the sum of twenty-five thousand dollars ($25,000) (Rec. p. 11).

On May 5th, 1923, the defendant filed a motion to set aside the verdict "as not warranted in law" (Rec. p. 88). As shown by the record no question was ever raised by the defendant that the amount of the damages assessed was excessive. The record states (p. 14) :

> "It was not disputed that the evidence of damages was sufficient to warrant a verdict for the amount assessed by the jury."

The defendant's motion to set aside the verdict was argued *June 25, 1923* (Rec. p. 8). It was granted but not until *September 6, 1923* (Rec. p. 88). On the *31st day of October, 1923*, Michael B. Ryan died, and on *December 22, 1923*, the present plaintiffs filed a motion that the action be revived, and that they as administrators of Ryan be joined as plaintiffs and be permitted to prosecute the action (Rec. p. 13). The defendant's counsel thereupon as stated in the defendant's petition for rehearing "caused careful inquiry to be made as to whether by the law of Costa Rica the cause of action survived, and in particular submitted the question to one of the leading members of the Costa Rican Bar, who rendered a written opinion" thereon (Deft's petition for rehearing, Rec. p. 134).

After a lapse of nearly six (6) weeks from the time the motion to revive the action was filed, to wit, on *January 31st, 1924* (Rec. p. 13), the defendant's counsel "suffered the same to be allowed" (Defendant's petition for rehearing, p. 135) and saved no exception. There is no evidence in the record of the law of Costa Rica relating to the survival of actions. There is no evidence in the record of what relatives of Ryan survived him. The issue of whether or not the action survived the death of Ryan was *tendered* by the plaintiffs when their motion was filed to revive the action. The defendant did not see fit to join issue upon the motion, even after its learned counsel had made all the effort he desired to ascertain his client's legal rights

which included the opinion of "one of the leading members of the Costa Rican bar".

Upon that motion the plaintiffs had the burden to prove their allegations affirmatively, including the law of Costa Rica if survival depended on that law, and if the survival of the action depended upon the existence of certain heirs of Ryan, the burden was on the plaintiffs to show it, and also other facts, including their authority as administrators.

If the defendant wished to contest the plaintiffs' motion to revive the action upon the ground that its survival depended upon the law of Costa Rica, and that Ryan left no heirs in the "direct line of ascent or descent", it should have demurred or filed a plea in abatement at the proper time.

The defendant saw fit to take it for granted that the facts existed upon which it says the allowance of the plaintiffs' motion depended, instead of requiring proof of the same, when it had the legal right to do so, if the facts are material at all.

The defendant makes no contention that the *facts have changed* relevant to the questions it now seeks to raise since the motion to revive the action was filed and allowed. After the defendant had been advised upon all the questions which it now seeks to raise and occupied about six weeks in considering the effect of the motion voluntarily "suffered the same to be allowed".

The defendant's and plaintiffs' counsel engaged in the preparation and settlement of the plaintiffs' bill of exceptions which continued at intervals until a final agreement on the form of the bill of exceptions was reached and it was *"filed* and allowed on March 12, 1924" (Rec. p. 14), without objection by the defendant. The defendant states in its petition for rehearing (Rec. p. 134) that it "suffered the bill of exceptions to be allowed in its present form". While the defendant uses the expression that it "suffered" the plaintiffs' motion to revive the action, and the bill of exceptions to be allowed, nevertheless it *admits that it gave its consent to both.* The plaintiffs' petition for a writ of error to the Circuit Court of Appeals was filed April 30, 1924 (Rec. p. 101) and the citation was issued on May 2d, 1924 (Rec. p. 106), on which the *defendant's attorney*

personally accepted service in writing May 5, 1924 (Rec. p. 106), *without any reservation* of rights under said motion to revive, and thereby joined issue with the plaintiffs on the merits of the action and caused the same to be heard by the Court of Appeals at great expense to the plaintiffs. The District Court made a special effort to present the case to the Court of Appeals so that final judgment on the merits could be entered in that Court.

The Court stated after referring to the case as being expensive to try: "I shall let the case go to the jury and take special findings, and if they find for the plaintiff take an alternative verdict for the defendant so that the final judgment can be entered in the Court of Appeals." (Rec. p. 76.) The Court further stated at another time: "I should like to put this case in such shape that you can get final judgment on it in the Court of Appeals." (Rec. p. 78.)

The counsel for the parties acquiesced in this course and the bill of exceptions was allowed by the Court upon that understanding. The exceptions were argued in the Court of Appeals and the opinion of the Court reversing the decision of the District Court and sustaining the verdict for the plaintiffs was filed on January 6, 1925 (Rec. p. 109), *nearly a year after the order was made allowing the motion to revive the action.*

The defendant filed a petition in the Circuit Court of Appeals for a rehearing (Rec. p. 123), raising for the first time the question of the validity of the order of the District Court allowing the motion to revive the action. In the petition for rehearing the defendant says:

> "The defendants are prepared to show both by references to the statutes of Costa Rica and by the opinion of duly qualified experts that under the law of Costa Rica a cause of action like the one in question survives only to direct ascending or descending relatives. They are also prepared to show that the burden of proving the existence of such relatives is upon those asserting the right of survivorship." (Rec. p. 135.)

The effect of this statement is a request that the plaintiffs

now proceed to establish the validity of the order of the District Court made more than a year ago and assented to by the defendant, upon which was predicated all the proceedings on the merits in the Circuit Court of Appeals since that time.

The defendant's petition for rehearing was denied by the Circuit Court of Appeals on March 5, 1925, and a printed opinion was filed in the clerk's office on that date (Rec. pp. 137–9).

On March 7, 1925 (Rec. p. 140), the mandate issued to the District Court in accordance with the following judgment of the Circuit Court of Appeals: "The judgment of the District Court in favor of the Northern Railway Company is vacated, the verdict in its favor is set aside, and the case is remanded to the Court with directions to enter a verdict for the plaintiff in error as to it, with costs." (Page 141.) It cannot be disputed that the defendant's counsel was informed and *knew that the mandate was to issue and made no objection thereto.*

On March 23, 1925, the plaintiffs moved for judgment on the mandate in the District Court and for issuance of execution. Extract from docket entries in District Court annexed hereto, pages 33–4.

Defendant's counsel appeared when the motion for judgment was made and did not oppose it. The motion was allowed and thereupon judgment was entered for the plaintiffs on the mandate for the sum of $27,833.33 damages and costs taxed at $448.85. Docket entries annexed, page 33–4.

On April 22, 1925, the defendant filed a motion in the Circuit Court of Appeals that the mandate be recalled and the judgment of the District Court be vacated, *which was heard and denied.* Certified copy of motion annexed hereto, page 35.

On April 22, 1925, a motion to vacate the judgment was filed by the defendant in the District Court and was heard before Brewster, J., on April 27, 1925. Certified copy of defendant's motion to vacate judgment annexed hereto, page 32. Docket entries annexed hereto, pages 33–4.

The original motion was mislaid or lost in the clerk's office and a substituted motion was filed by consent of counsel August 5, 1925. (See endorsements on defendant's motion to vacate judgment annexed hereto.) The motion was opposed at the

hearing by plaintiffs' counsel but was allowed by the Court and judgment was accordingly vacated. Docket entries annexed hereto, pages 33–4.

It is respectfully submitted that after the trial of the action on the merits and the *issue of the mandate of the Circuit Court of Appeals to the District Court*, it is too late for the defendant to raise the question for the first time that the action finally abated on the death of Ryan.

Ex parte Story, 12 Peters 339, and cases cited.

It is stated in Foster's Federal Practice, 6th ed., page 1194:

> "It seems that *any step* in the cause taken by the surviving party after the death of one or more of his opponents, is a waiver of his right to object that the cause has not been revived."

citing *Ex parte Story, supra.*

THE SURVIVAL OF THE ACTION DEPENDED UPON THE LAW OF MASSACHUSETTS, THE FORUM.

The defendant's brief on page 16 states:

> "The Ruling of the Circuit Court of Appeals as to the Survival of the Action was wrong."

According to the authority of this Court, which the Circuit Court of Appeals followed, the law of the forum governs the survival of an action, provided it is begun in due time. In *Baltimore & Ohio R. R. Co.* v. *Joy*, 173 U. S. 226 at page 228, the question upon which the Court below desired instructions of this Court was:

> "Does an action pending in the Circuit Court of the United States sitting in Ohio, brought by the injured person as plaintiff to recover damages for injuries sustained by the negligence of the defendant in Indiana, finally abate upon the death of the plaintiff in view of the fact that, had no suit been brought at all, the cause of action would have abated both in Indiana and Ohio, and that, even if suit had been brought in Indiana, the action would have abated in that State?"

The action was held not to abate.
The Court said in discussing it:

> "We think that the right to revive attached under the local law when Hervey brought his action in the State Court. It was a right of substantial value and became inseparably connected with the cause of action so far as the laws of Ohio are concerned. Was it lost or destroyed when, upon the petition of the railway company, the case was removed for trial into the Circuit Court of the United States?
>
> "Was it not rather a right that inhered in the action. and accompanied it when *in the lifetime* of Hervey the Federal Court acquired jurisdiction of the parties and the subject matter? This last question must receive an affirmative answer. . . ."

In *Gerling, Adm'r of Martin*, v. *Baltimore & Ohio R. R.*, 151 U.S. 673, the Court say at pages 692–3:

> "But in the case at bar, the question whether the administrator has a right of action depends upon the law of West Virginia, *where the action was brought.*"

See also *Martin* v. *Wabash R. R. Co.*, 142 Fed. Rep. 650.

The law of Massachusetts provided for the survival of actions for personal injuries under the Statutes of 1842, Ch. 89, Sec. 1, changing the common law rule (construed in *Hollenbeck* v. *Berkshire R. R.*, 9 Cush. 478), and later re-enacted in Public Statutes, Ch. 165, Sec. 1, now General Laws, Chap. 228, Sec. 1.

> "A right of action simultaneous with the injury accrued to the intestate," . . . "subsequent death does not defeat it, but, *by operation of the statute*, vests it in the personal representative."
>
> *Battany* v. *Wall*, 232 Mass. 138, at 140, citing and quoting *Hollenbeck* v. *Berkshire R. R.*, *supra*.

The case at bar is an action at common law for personal injuries received as the result of the alleged negligence of the defendant.

It is certain that if the injury had been *inflicted* in Massachusetts the action would survive.

In the cases cited above, this Court has decided that even though an injury were inflicted outside of Massachusetts, an action brought in Massachusetts by the injured party in his lifetime would survive.

No case cited by the defendant presents any conflict of law with the authorities relied upon by the plaintiffs as applied to the facts in the case at bar.

Davis v. *N. Y. & N. E. R. R. Co.*, 143 Mass. 301 (hereinafter referred to as the "Davis Case"), upon which the defendant relies as an authority that the Massachusetts Statute (G. L. 228, Sec. 1), providing for survival, does not apply to actions brought within the State to recover for injuries received outside of the State, is not in point.

It does not decide broadly that *all actions* brought to recover for injuries received *outside* the State fail to come within the Statute. On the contrary it only decides that the cause of action must be *alive when brought* into the State.

In the Davis case the injured party died before the action was begun and the cause of action was *not alive when the action was brought.* It had died in Connecticut with the person; it was extinct before the personal representatives sought to revive and maintain it in Massachusetts. The Court rightly took the view that the personal representatives virtually sought to *create* a cause of action in Massachusetts.

Such are not the facts in the case at bar. *Ryan brought* an action of tort in the District Court in Massachusetts while his cause of action was still alive.

Higgins v. *Central N. E. R. R.*, 155 Mass. 181, clearly states the distinction between the Davis case and those like the case at bar.

The Court says at page 178:

> "Suits brought to enforce rights of action which the deceased had, and which survived and passed from him to his administrator, differ essentially from those which this court refused to entertain in *Davis* v. *New York & New England Railroad*, 143 Mass. 301. In Davis' case the in-

testate had a right of action in his lifetime by the common law of the State of Connecticut, where he was injured; but by the law of Connecticut his right of action did not survive, and was extinguished at his death, while a penal action created by statute was substituted for it in that State."

In *Whitford* v. *Panama R. R. Co.*, 23 N. Y. 465, the action was brought after the death of the injured party, by his personal representatives. The cause of action arose in New Grenada where no survival was provided by law. The Court held that no cause of action existed after the decedent's death and and no action could be brought in New York State by his representatives.

In *Needham* v. *Grand Trunk Ry. Co.*, 38 Vt. 294, no action was begun in the lifetime of the injured party. The accident occurred in the State of New Hampshire where the common law prevailed and the cause of action did not survive. An action was brought by the administrators in Vermont where the law provided for the survival of actions for personal injuries. The Court held that the action could not be maintained.

In *Mexican Central Ry. Co.* v. *Goodman*, 20 Tex. Civ. App. 109, the injury occurred in Mexico, where a suit was begun by the injured party but where it did not survive his death. Subsequently his personal representatives began an action in Texas for the same cause where such actions survived, but the Court held that the action could not be maintained for the reasons set forth in the preceding cases. Like the Davis case, the personal representatives sought to obtain the benefit of a distinct and independent statute which would virtually allow them to create a new cause of action.

In *O'Reilly* v. *New York & New England R. R. Co.*, 16 R. I. 388, no action was begun in the lifetime of the injured party, but by the law of the State where he received his injury, namely, Massachusetts, a cause of action for personal injuries survived. An action was brought by the decedent's personal representative in Rhode Island, where a cause of action of that kind survived. The law of the forum finally determined the

question of survival. The law of the place where the injury was received was material only upon the question whether the *cause of action* existed where the action was begun in Rhode Island, in which the law of the latter place respecting survival of actions could be applied. The Court held that it did exist and as the "lex fori" provided for survival, the action would not abate.

Clough v. *Gardiner*, 111 Misc. (N. Y.) 244; affirmed 194 App. Div. 923, supports the plaintiffs' contention that the law of the forum is the test of survival; since in this case it was the "lex loci" that provided for the survival of such a cause of action while the "lex fori" did not and the action was held to abate.

That case presents the converse of the facts in the preceding cases and illustrates clearly the principle of law that applies in all.

The defendant contends that the following cases are in conflict with the decisions in *Baltimore & Ohio R. R. Co.* v. *Joy* and *Martin* v. *Baltimore & Ohio R. R. Co., supra:*

Patton v. *Brady*, 184 U. S. 608, 612.

This was an action at law brought in the Circuit Court in Virginia to recover money paid to a Collector of Internal Revenue for taxes paid under protest. It was contended that the cause of action being in the nature of a tort, that the action abated by the death of the defendant. The cause of action arose in the State of Virginia where *the action was brought.* The defendant died during the pendency of the action. The Court said:

> "it matters not whether we consider the common law or the statute law of Virginia as controlling, by either the cause of action stated in the complaint survives the death of the defendant."

The statement of the Court that the question of survival must be determined by the laws of the state in which the cause of action arose is, therefore, a mere dictum.

Stratton's Independence, Ltd., v. *Dines*, 126 Fed. Rep. 968; affirmed 135 Fed. Rep. 449. While in this case the Court said,

> "where the complaint is an action against executors to recover for alleged false representations made by the decedent shows that the representations were made in England, the law of that country governs, and under such law the cause of action did not survive",

yet the Court did not decide the case upon that ground for it referred to the statute of Colorado, where the action was brought, which provided that only *pending actions* of this kind should survive. Since this action was not pending in the lifetime of the deceased, the Court held that the action could not be maintained under the Statute of Colorado, the law of the forum.

Sanders v. *Louisville & Nashville R. R. Co.*, 111 Fed. Rep. 708. This action was brought on a death statute of Tennessee. All the parties authorized by the statute to sue and having a legal right to recover had died. A plea in abatement was sustained and the action dismissed.

Michigan Central R. R. Co. v. *Vreeland*, 227 U. S. 59.

This was an action for personal injuries under the United States Employees Liability Act in favor of railroad employees. As the cause of action was created by a Federal statute, its survival depended on the Federal statutes, which did not provide for survival.

The case of *Van Choate* v. *Gen'l Electric Co.*, 245 Fed. Rep. 120, was a suit for the infringement of a patent and the case of *Crapo* v. *Allen*, 1 Sprague, 184, was a cause in admiralty, neither of which is in point.

Slater v. *Mexican National R. R. Co.*, 194 U.S. 120.

The injury upon which the cause of action arose, was received in Mexico. Under the laws of Mexico, a right of action was given for injuries resulting in the death of a person in favor of the surviving wife and minor children. The action was in the United States Circuit Court in Texas. The plaintiffs were the widow and children of Slater, who was killed through the defendant's negligence in Mexico. The Court held that the action could not be maintained on account of the dissimilarity

of the law of Mexico and Texas; that the courts of the United States had no power to make a decree of the kind contemplated by the Mexican statutes. To do so would have been to give the plaintiffs the benefit of a totally new and different cause of action.

Upon a careful reading of the cases cited by the defendant we can find no conflict of authority, and respectfully submit that the following statement in the defendant's petition (p. 5) is clearly wrong:

> "Upon the fundamental question whether the survival of a cause of action for personal injuries depends upon the law of the place where the injuries were received or upon the law of the forum the federal authorities are conflicting and indecisive."

and that it presents no question for review by this Court.

SETTLEMENT WITH THE GOVERNMENT OF COSTA RICA.

The defendant contends that it was released from liability by the transactions between Ryan and the representatives of the Costa Rican Government, on the theory that Ryan and the Government were joint tort feasors and that by the settlement with that Government the defendant was released from liability.

The defendant relies upon the following defence set up in its answer:

> "Further answering the defendants say that the plaintiff has received the sum of ten thousand dollars from the Republic of Costa Rica as compensation for the injuries referred to in the declaration, and has *given a release to the said Republic* and for that reason cannot maintain this action." (Rec. p. 10.)

This is of course *matter in avoidance* of which the defendant has the burden of proof.

The settlement of a claim against a sovereign state does not operate to release a wrongdoer.

Pickwich v. *McAuliff*, 193 Mass. 70.

Cormier v. *Worcester Street Railway Co.*, 234 Mass. 193, at 197.

The evidence in the case at bar is that in 1918 the Costa Rican Government through its representative proposed to pay to Ryan the sum of $10,000 in monthly instalments of $500 each, because of the friendly relations of Ryan with Tinoco, the President of the Government of Costa Rica, which at that time was an unrecognized Government (Rec. p. 56, X-Q. 40) and which was afterwards overthrown by an insurrection (p. 71). The payments of $500 a month were made *until the Tinoco Government was overthrown* (Rec. p. 71), at which time they amounted to $6,000. The payments were to begin September 1, 1918 (Rec. p. 92). $6,000 was paid at the rate of $500 a month (Rec. p. 71) and as the payments continued from September 1, 1918, until the Tinoco Government was overthrown, that Government ceased to exist *about September 1, 1919.* Ryan had no further transactions directly with the Government or its representatives, and consequently the original promise made to Ryan was never fulfilled by *that Government.*

Ryan testified that Tinoco was "a friend his"; that he was in Costa Rica conferring with the President about plans for a colony of Belgian War refugees then in England (Rec. p. 15); that he was met on his arrival in New York after the accident by one Pisa, a representative of President Tinoco, who was directed by the President to take Ryan to *"the best eye surgeon"*, and to spare *"no reasonable expense"* . . . *"to get my sight back"*; that Pisa stated that they stood ready to pay all reasonable expense "to get me on my feet again *so that I could go on with the Belgian Colony"*. (Rec. p. 68–9, Q. 175–177); that Pisa then referred him to Lara, an ambassador of Costa Rica living in New York, stating that Lara would take care of all expenses *in connection with these operations* (Rec. p. 69); that at first it was suggested by Lara that he (Ryan) would have to go to Europe for treatment because several of the eye specialists referred to were engaged in the War, but later specialists at home were selected and it was agreed to allow him ten thousand (10,000) dollars for medical and surgical treatment.

"But he (Lara) said they *denied all responsibility* for

this accident and it was to *be not considered as damages* but it was to be considered more as a gift *to take care of this immediate necessity of surgical operations and medical attention and nurses and so forth.*" (Rec. p. 71.)

Lara also said:

"Any damages . . . we don't consider this damages, *any damages you will have to get out of the Railroad Company.*" (Rec. p. 71.)

The letter containing the promise to pay (Defendant's Exhibit C, Rec. p. 92) corroborates the plaintiffs' testimony that the transaction was a diplomatic one, and not based *upon the recognition of any possible legal obligation for a tort.*

The defendant in its brief in support of its petition (p. 24) has quoted parts of the letter from Lara and of the reply made by Ryan. Both these letters appear on pages 92–3 of the record as Exhibit C and D, respectively. The unquoted portion of the first letter is as follows:

"My dear Mr. Ryan: The Government of Costa Rica presided over by Mr. Frederico Tinoco does not in the slightest degree make itself responsible for the accident that happened to you in the revolutionary emergency that took place during March last, since that responsibility rests only on those who meant to revolt the country at large, but Mr. Tinoco who deeply deplores and sympathises with your bereavement has instructed me to arrange with you the manner to indemniside you for the damage done."

The defendant's brief (p. 24) states:

"The Circuit Court of Appeals state that the plaintiff's acceptance of the offer made by the Costa Rican Government 'was not to take effect until his acceptance reached the Costa Rican Government' and that 'the resulting contract is to be interpreted according to the law of that country' (Record, p. 118). This language, it is submitted, shows that the court wholly misapprehended the defend-

ant's position. *The settlement relied upon by the defendant* was effected in New York in August, 1918, as evidenced by the exchange of letters between the plaintiff and Carlos Lara, the Costa Rican ambassador, representing that Government. (Record, p. 69.)"

The failure of the Tinoco government to fulfill its promise released Ryan from his obligation, if any, under the original transaction.

Two years after the Tinoco goverment was overthrown and the payments to Ryan ceased, the United States Government at the plaintiffs' request took up Ryan's matter with the new Costa Rican government, with the result that the Foreign Relations Department of Costa Rica wrote to the Secretary of State of the United States:

> "As your Excellency actually knows the legal situation created by the acts and decrees of the Tinoco Administration, it is unnecessary to state that the agreement entered into with Mr. Ryan *has no legal standing and therefrom it is derived from the fact that we cannot recognize proceeds for the sum unpaid.* However, *my Government being inspired of equitable sentiments and desirous of showing with facts the goodwill* **towards the American citizens in general** *and specially to one who by the impolicy of the Costa Rican Troops was injured,* such as losing the eyesight, is willing to pay to Mr. Ryan the sum of *four thousand American gold,* on *successive monthly installments of $500 dollars to commence on the date of the first payment."* (Rec. p. 91.)

There was no direct communication between Ryan and the representatives of the Government of Costa Rica after the monthly payments ceased in 1919.

This new affair was conducted exclusively *between the two governments,* both of which treated it as a purely diplomatic occasion, and it was *predicated upon the protest of the Costa Rican government against any legal responsibility.*

The letter of Ryan to the United States Secretary of State, Defendant's Exhibit A, and the letter from the Costa Rican

official to the United States Secretary of State, Defendant's Exhibit Ba, were admitted under Ryan's objection as incompetent, being communications between strangers (Rec. p. 72).

Even if the *new* transaction were construed to be *Ryan's* communication of acceptance to the Costa Rican authorities, it did not take effect until it reached Costa Rica, and the resulting contract, if any, as stated by the Circuit Court of Appeals in its opinion, would be interpreted by the law of Costa Rica, under which the Republic of Costa Rica is not a solidary debtor, and its release would not absolve the defendant from liability.

The defendant contends that the effect of the agreement of settlement between Ryan and the representatives of Costa Rica depends upon the common law and not the law of Costa Rica.

As a *practical matter* it is of little or no consequence as relating to the question of what, if any, remedy, Ryan had against the Republic of Costa Rica. He could have obtained no *jurisdiction* in any proceeding brought by him outside of Costa Rica, and as no judgment of court in Costa Rica in any case is enforceable against the State of Costa Rica, it would be immaterial upon the law of what country the agreement depended.

It appeared in evidence that under the law of Costa Rica no judgment could be obtained that was enforceable against the state of Costa Rica (Rec. p. 73).

On this point Professor Roscoe Pound testified as follows:

> "This judgment obtained against a State is certainly on the same footing, to use an analogy, according to our law, as a judgment from the Court of Claims. The proceedings are ordinary civil proceedings, but the best analogy that I can give you to the nature of the transactions would be the Court of Claims, because the judgment isn't enforceable by execution or by ordinary process, but the judgment is exactly on the same basis."
>
> "*Q.* 14. That is what I was going to ask you. Is there any way to enforce the judgment against the state?" (referring to the state of Costa Rica). *A.* "Well the same way in which a judgment of the court of claims can be enforced or not the same way but analogous. It is analogous

by the Government appropriating to pay the judgments which are rendered against it. In that way the *Courts have no control* over the revenues and *no execution is possible.*" (Rec. p. 73–74.)

Ryan reserved his rights against the defendant in his transaction with the officials of Costa Rica.

The defendant admitted it at the trial.

The court stated:

"I am inclined to instruct the jury to report whether they find that he (the plaintiff) reserved his right against the railroad when he settled with Costa Rica.

Mr. DODGE. Your Honor need not bother the jury with that question, because I don't question his testimony that there was a tacit understanding, not expressed, however, *in the final agreement* as made. I contend that it had no legal effect, but I do not question, and I am willing to concede for the purposes of this case, that the jury would find that there was *intended to be a tacit reservation* of the right against this defendant, *an intention expressed in conversation before the documents were executed.*" (Rec. p. 77.)

The defendant contended that the testimony of Ryan was at variance with the written correspondence between him and the officials of Costa Rica, and therefore not admissible. We submit that it is not at variance with a fair and liberal interpretation of the correspondence. The claim to which the parties referred in their correspondence related solely to the *expenses of medical and surgical treatment of the eyes;*—it was distinct from damages for loss of employment, and mental and physical suffering, and furthermore the rule against parol evidence does not apply in this case. The defendant was not a party to the written correspondence relied upon. They were communications between Ryan and strangers or between the representatives of the two governments.

Barreda v. *Silsbee,* 21 How. 146, 165–170.
Libby v. *Company,* 67 N. H. 587–588.

The evidence is clear that as a matter of fact the Costa Rican

officials and Ryan at all times understood that the payments of money were voluntary; that the money was paid for a *specific object*, namely medical and surgical treatment for the purpose of getting Ryan back to work for the interests of the Government.

For this reason it cannot reasonably be contended that Ryan and the Costa Rica officials understood that Ryan was receiving satisfaction for a legal claim for damages for a wrong committed by the Government.

The jury found the damages to be $35,000, from which, with Ryan's assent, was deducted $10,000 in mitigation of damages.

With the exception of the case of *Metz* v. *Soule Kretsinger & Co.*, 40 Iowa 236, the cases cited in the defendant's brief as we understand do not include any decided case in which the release relied upon as a bar to the suit was given to a sovereign state or to any person other than one against whom an action at law would lie and in which a judgment if obtained would be enforceable.

In that case the trial court refused the following request for ruling made by the defendant, to which the defendant excepted (p. 237–8):

> "If plaintiff made application by petition to the General Assembly of the State of Iowa, on account of his said personal injuries received while a convict in the Iowa Penitentiary, and in such petition claimed relief on the ground that he sustained said injuries while acting in obedience to the orders of an agent of the State, under whose control he was in said Penitentiary, and that though he protested against doing the work he was ordered to do by an agent of the State, yet he was peremptorily ordered to do the same by the agent of the State, and *claimed relief on the ground that the State was responsible for the damage done his person by said injuries*, and upon such application of Metz, the General Assembly appropriated out of the State treasury; . . . and if Metz since has in fact received such monthly payment under said act, that would be in law a satisfaction of his damages on account of said personal injuries, and the plaintiff cannot recover in this suit."

The Supreme Court, sustaining the exception, stated (p. 238):

> "The instruction asked should have been given. The plaintiff, by prosecuting his claim against the State, as a *wrongdoer*, in the only way available to him, and by accepting the benefits of the act passed in his favor, is *estopped to deny* that the injury occurred *through the wrongful act of the State.*"

In the case at bar there is no evidence that Ryan ever claimed that the *State* had done any *wrong*. The representatives of the Government took the initiative and *came to him and offered him help for medical and surgical treatment* so that he might be able to return to his project of the Belgian Colony.

The case at bar is exceptional in that Ryan at the time of the accident was engaged in work of colonizing for the development of property in Costa Rica, which the *Government desired to promote*, and the President sought to have the work resumed as soon as possible and *Ryan's disability had to be removed before that could be done.*

The defendant was bound to satisfy the jury by a preponderance of the evidence:

1. That by the law of Costa Rica the Republic might be regarded a *tort feasor*, and that an action of tort could be maintained against it and a judgment enforced.
2. That Ryan claimed that the Republic was a *wrongdoer* and that the money was paid for *that reason* and not that it was paid to Ryan as a gratuity.

The law is not contained in a *single statute or decision.* It consists of "A code based upon the French Civil Code of 1804 with certain supplementary legislation", which is "essentially declaratory of the civil law" (Rec. p. 65–6). The opinion of Prof. Pound was the result of his examination and knowledge of the statutes, and of the decisions of the courts of Costa Rica, and his testimony was the only evidence in the case on that subject (Rec. p. 72–3–4).

Where the evidence of foreign law consists only in a *single statute or decision* it is held that its construction is for the court, but where the evidence consists in several statutes or

decisions, as it does in this case, the foreign law is a question of fact to be left to the jury.

Ufford v. *Spaulding*, 156 Mass. 65, 66.
Electric Welding Co. v. *Prince*, 200 Mass. 386, 390.

The defendant asks this Court to rule that the jury were bound to find that the defendant had sustained the burden of proof and had established by a preponderance of the evidence the facts which were essential to constitute a release of a joint tort feasor, and to be a bar to this action.

It amounts to a request that the Court rule *that the jury must give more weight to the evidence than it did, and sufficient weight to sustain the burden of proof.*

We respectfully submit that the Court of Appeals did not err in its view of the law that governed the settlement, and in any event its opinion was no prejudice to the defendant, because the questions raised were facts for the jury, who found them adverse to the defendant.

DEFENDANT'S NEGLIGENCE.

The defendant's third ground for the petition is stated to be: "There was no evidence of negligence proper for the consideration of the jury." (Deft's Brief, p. 25.)

The defendant's counsel state that they adopt the language of Judge Morton in his memorandum setting aside the verdict (Rec. p. 99) and that of Judge Johnson in his dissenting opinion in the Circuit Court of Appeals, as stating the defendant's position, and construe it as finding that the cause of the damage complained of was "the wrong-doing of a stranger"; "that the voluntary act of a third person intervened", that could not be "clearly foreseen as the probable consequence of the defendant's act or omission" (Deft's Brief, p. 25). Specifically that the intervening act of the third person consisted of "incredible folly" on the part of the officers in charge of the troops", as stated by Judge Morton (Deft's Brief, p. 26).

It was not disputed that the defendant was a common carrier and was on the day of the accident operating two trains of passenger cars, one carrying a Government armed military

force, and the other occupied by armed insurrectionists and some civilians as passengers, including Ryan.

For convenience of reference we will call the first the "troop train" and the other the "passenger train". The passenger train was the *regular daily east bound* train from San Jose to Limon. It was seized by the insurrectionists at about 11.30 A. M. at Turrialba in Costa Rica on the day of the accident.

The insurrectionists were armed and held the train at Turrialba until about 5.45 P. M.

The chief train dispatcher Powers testified on cross-examination:

> "×-*Q.* 25. Do you know what time the passenger train pulled out of Turrialba? *A.* It left Turrialba in the neighborhood of about 5.45." (Rec. p. 55.)

Some of the insurrectionists were aboard the train at all times at Turrialba and remained aboard when it left.

Ryan testified:

> "×-*Q.* 110. They didn't get on your train at Turrialba until the last minute, did they? *A.* These men?
>
> ×-*Q.* 111. Yes. *A.* The men with the picks and shovels and *fellows with guns* were sitting up on there, and the fellows with whatever arms they had were up on top of the freight car quite a little.
>
> ×-*Q.* 112. *Before you started?* *A.* Yes.
>
> ×-*Q.* 113. And it was the men with the tools that jumped on at the last minute? *A.* Yes." (Rec. p. 31.)

It was claimed by the defendant that the passenger trian was "*released*" by the insurrectionists when it left Turrialba at about 5.45 P. M., but according to the undisputed testimony it proceeded to Torito, a few miles east of Turrialba, *with some of the armed insurrectionists aboard.* Therefore the passenger train must have been occupied by an armed enemy until about six o'clock in the evening.

At that time the troop train was at Las Lomas about 6 miles from La Pascua, where the two trains met by order of the defendant (Rec. p. 18). The troop train left Limon at 3.30

P. M. (Rec. p. 17). The defendant's general manager, Chittenden, testified:

> "×-*Q.* 38. Before the troop train left Limon, the train men were informed, were they not, that the passenger train at Turrialba was in the hands of the revolutionists? *A.* Yes, sir." . . .
>
> "×-*Q.* 42. And the commander of the troops and the train crew knew that this passenger train was in the hands of the revolutionists? *A.* Yes, sir." (Rec. p. 55–6.)

The passenger train left the revolutionists at Torito and then proceeded to Peralta a few miles farther east, so that as late as six o'clock in the evening the trains were about 12 or 13 miles apart, the troop train at Las Lomas and the passenge train at Peralta, with La Pascua the meeting place about midway between them.

There was some confusion in the testimony about the messages from the passenger train.

Ramsay the conductor of the passenger train testified that he left a message at Peralta that "**some** revolutionary forces got off" at Torito (Rec. p. 62, X-Q. 27), thereby implying that others were still aboard.

Another witness testified that the message stated that "*all* the rebels have gotten off".

But whatever the message was, up to that time, about 6 o'clock in the evening, the passenger train was carrying an armed enemy of the Government, and only 12 or 13 miles away from the troop train.

The troops embarked at Limon and were

> "ordered to Turrialba to meet the rebels." (Rec. p. 17.)

The train crew and the commanders of the troops knew that the passenger train was in the hands of the revolutionists (Rec. p. 55–56) and consequently the passenger train was the *objective* of the expedition.

The troop train left Limon at 3.30 P. M., and before they left, the defendant's officials had received word that the insurrectos would hold the passenger train unless they were provided with

another engine, which the defendant refused. This message was received at about 1 o'clock (Powers, Rec. p. 51–2, X-Q. 20), two and one-half hours before the troop train left Limon (Rec. p. 17), and the jury were warranted in finding that the troops knew of the whole situation of the insurrectos before they left Limon.

The defendant's counsel stated in his opening to the jury, referring to this message:

> "And, furthermore, a large part of the message was to the effect that, 'If you send up another engine the rebels say they will let this one go.' You can imagine whether or not the railroad or the Government would choose to give the rebels another engine." (Rec. p. 48.)

The passenger train was in the hands of the regular train men,—the employees of the defendant (Rec. p. 16).

And also the troop train was run by the regular train crew employed by the defendant (Rec. p. 43–4, Q. 62–3).

The defendant was operating both trains.

At the close of the evidence the Court stated without the defendant's objection:

> "I regard the operation of the trains on the evidence as having been sufficiently under the control of the railroad so that they were bound to run them carefully. They were doing the operating." (Rec. p. 78. See Rec. p. 87.)

There were ample means of communication by telegraph and telephone between Limon and all stations on the road (Rec. pp. 37, 63).

The efforts of the officials at Limon to inform the troops that the enemy had left the passenger train and that it was occupied by civilians consisted of the testimony of the train dispatchers and the general manager.

The first message was sent to the troop train at Las Lomas according to the evidence (Rec. p. 60, Q. 17, 18).

The chief train dispatcher who was present at the time testified that the message was:

"Engine 48 run Siquirres to Peralta as a special to meet extra east engine at Pasqua." (Rec. p. 59.)

According to the testimony of the chief train dispatcher, this was the entire message to the troop train.

The assistant train dispatcher testified that he added that

"Special 38 east has no revolutionists on the train." (Rec. p. 60.)

The general manager testified that he telephoned *to a yard master* at Siquirres to tell the agent at Las Lomas

"that there were non-combatants and non-combatant passengers, including women and children, on the passenger train." (Rec. p. 57–8.)

The commanders of the troops, therefore, from about 3.30 o'clock till 6 o'clock, that is, from the time they left Limon until they reached Las Lomas, a distance of about 44 or 45 miles, supposed that the enemy occupied the passenger train, and that it was at Turrialba, in the same situation as it was when the troop train left Limon.

The plaintiffs contend that the messages sent to Las Lomas were meagre and misleading.

The troop train was at Las Lomas at about 6 o'clock, and only six miles from La Pascua, the meeting point, where it arrived at about 7 o'clock (Rec. p. 18, Q. 1–2).

The jury could properly have found that there was nearly an hour when the troop train was delayed at Las Lomas, during which the officials at Limon could have given them *all the information in* **detail**, of the movements of the passenger train, its occupants, and of its freedom from the enemy.

It was an occasion when no pains should have been spared to prevent the troop train from meeting the passenger train until the occupants of each *knew* of the friendly character of the other.

To the troops, the passenger train was the equivalent of the enemy itself, and its appearance was a challenge for an attack. All of which the defendant's general manager and its other officials at Limon well knew and they should have realized the

state of mind of the commanders of the troops and the tension they were under.

As Judge Morton stated during his charge to the jury:

> "At the same time we are to remember that this was an armed force (the troops) mobilized and proceeding into contact with the enemy; that at this time it was about 12 or 15 miles, not more than that, from where the enemy *were known to be assembled;* that this train had come forward only that distance from where the enemy were in some force, and that it was obviously a situation in which there could not fail to be a good deal of *tension and anxiety* on the part of the officers who were in charge of that movement, *a very nerve-wracking time and a very critical time when they are approaching as closely as that and had not yet made their first contact with the enemy; and in that situation they met this train coming down from this close-at-hand camp of the enemy.*" (Rec. p. 82.)

How could the general manager in reason suppose that such a barren message as that testified to by the assistant train dispatcher would convey the information that the "regular" east bound train which the troops were to attack,—a train having cars carrying gold and silver and other valuables (Rec. p. 16), and attached to a locomotive demanded by the enemy,—had undergone such a change in a few hours as to be released and to become a friendly train occupied only by civilians, including women and children.

The very fact that the message stated no particulars about the train, carried the idea that the "special" so-called was an unimportant one, and would not suggest its identity as the "*regular*" *east bound train*, the train sought by the troops.

It is significant that the *chief* train dispatcher, in testifying to the contents of the message, did not say that it contained any reference to revolutionists or the absence of revolutionists.

The general manager assumed to discharge his grave responsibility of warning of danger in a matter of life and death by taking the chance that his telephone message to a *yard master* in Siquirres would be in turn correctly repeated to others at

Las Lomas, when there wasn't the slightest reason why he should not telephone or telegraph or both *directly with the occupants of the troop train*, and at length, and require that it be repeated for confirmation.

It is certain that the troops never received instructions that they were to meet the *regular* passenger train and that it was free from the enemy.

The jury were warranted in so finding from the fact that the troops prepared for the attack as soon as they sighted the passenger train (Rec. p. 18), and afterwards were ordered by the commanders to fire.

The Court stated in its charge to the jury:

> "We are bound to believe that the officers did think that that train had danger to their force in it, and on that account gave the order to fire." (Rec. p. 85.)

The Circuit Court of Appeals stated in the opinion (Rec. p. 117):

> "It is evident that the troops and their officers believed that the passenger train contained revolutionists—otherwise it is practically impossible to account for their action."

The crew of the passenger train and its passengers were kept in ignorance that they were to meet a troop train.

> "No information was given to Ramsay (the conductor) that the special train was carrying troops." (Rec. p. 18.)

Ryan testified:

> "*X-Q.* 123. Did you understand you were going to pass a train there (La Pascua)? *A.* No. I didn't know anything about it.
>
> *X-Q.* 124. You hadn't heard about that? *A.* No; I didn't hear anything about it." (Rec. p. 32.)

The defendant's general manager therefore allowed these two trains, which meant danger to each other, to meet without suitable warning of the danger, and confusion was the result.

It was ~~dark~~ dusk at the time the trains met and darkness was falling fast (Rec. p. 21, 22, 23.)

The defendant attempts to negative the effect of this gross inertia of the officials in a time of extreme peril, by the belated words and acts of the conductor of the passenger train at the time of the attack.

To avail the defendant, it must appear that the jury could arrive at no other reasonable conclusion than that the troops were told that there were no revolutionists on the train, that they were not told *too late* and were told *under circumstances* to make it available.

According to the testimony of Ramsay, quoted in defendant's petition for re-hearing (Rec. p. 132) when *first* asked on direct examination what train he had, he did not state in his answer that he said to the officers that there were no revolutionists on the train. His whole answer was

> "I advised him (the officer), that we had the regular passenger train from San Jose to Limon."

Although Ramsay, according to the testimony quoted in the defendant's petition for re-hearing (Rec. p. 133) the *second* time he was asked the question on direction examination, added to his answer the statement that "there were no revolutionists on board", the statement was hardly responsive to the question, and the jury could have properly found that it was not said at that time, but later.

Grant's testimony of what Ramsay said was

> "I tell you there are no revolutionists", or
> "I *tell* you *man* there are no revolutionists on this train." (Rec. p. 20.)

The words of Ramsay, testified to by Grant, "I *tell* you man", etc., plainly indicate that the officer had expressed or shown distrust, and the jury were warranted in finding that the signal to fire had been given before the statement "no revolutionists on board" was made, and that it was the signal of the officer to fire that called forth that excited remark and the "hollering" that there were no revolutionists on the train.

Grant's testimony (Rec. p. 20):

> "It was one of the officers who started that firing *just after being told that it was the passenger train*",

is consistent with the understanding that the order of things was that *just after being told what train it was and nothing more*, the firing began and then the shouts that there were no revolutionists on board followed.

The officers understood, of course, that their orders and instructions must come from the authorities who started them on the expedition or *they would act at their peril.* They had no means of knowing that Ramsay and Veitch were not under the threats and guns of the insurrectionists.

They could not know that Ramsay and Veitch were *not in sympathy* with the insurrectionists.

The existing Government was unrecognized at that time; the people generally were restive under it, and shortly after overthrew it. The military forces of the Government could take no chances of treachery.

For the officers to accept the words of Ramsay and Veitch was to disregard the official advices and to disobey the final orders received.

The meeting of Ramsay, Veitch and the officers of the troops was not a *peace council.* It was an hysterical situation.

It does not appear what the officers said in reply to Ramsay.

The officers may not have heard the statement that there were no revolutionists or else have heard it *too late.* It is certain that if they heard it, *they did not believe it,* and it was heard *under circumstances that made it unavailable to them;* otherwise they would not have made the attack.

Can it now be said as matter of law that the testimony of Ramsay, referred to by the defendant in its petition, would exonerate the officials of their negligence, constitute a defence and preclude a finding of negligence as the proximate cause of the accident. In other words, because Ramsay testified, was there no other reasonable conclusion from the evidence than that the officials of the road were not guilty of negligence, and that their negligence was not the proximate cause of the accident.

At what time Ramsay said there were no revolutionists and *under what circumstances* he said it, were typical jury questions and the jury saw and heard the witnesses who described the situation.

It is submitted that the statement of Ramsay to the officer was received

> "too late and under such circumstances as to render it unavailable."
>
> Opinion C. C. A., Rec. p. 118.

There was no intervention of the voluntary act of a third party that caused the accident in this case, as claimed by the defendant.

The defendant as a common carrier was transporting Ryan in its own train and by its own employees, which train *symbolized* the enemy of the Government at that time, and which was a challenge to the Government's military forces. The defendant was transporting these military forces at the same time on another train of its own, and knew of the danger to both trains if they met without warning of the changed conditions. The defendant had all the means of giving full warning, and it was its solemn duty to communicate the facts, all the facts, and the officials were guilty of gross inertia and negligence in failing to do so.

It is true, as the defendant says, that under the law of Costa Rica the defendant was bound to use only ordinary care. That is, of course, a relative question. In the situation presented of advancing Government troops in one train upon a train containing innocent passengers, but supposed to contain the enemy, nothing short of the greatest care would be ordinary care.

Judge Morton stated in his charge to the jury (Rec. p. 84):

> "It is obvious you would have to make that movement (the operation of the troop train) with the *greatest of precautions.* It would be, to compare a small thing to a great one, like passing a train across between the German and the Allied lines during the Great War. It would be a movement out of one hostile zone into the opposite hostile

zone, something which obviously could not be done except *with the very greatest precaution.*"

The consequences to the troops and their commanders would have been fatal if the passenger train had still been occupied by the enemy and the latter had succeeded in passing the troop train and getting to the rear.

These were all questions of fact for the jury.

The defendant's brief (p. 26) comments on the division of opinion of the judges of the District Court and the Circuit Court of Appeals, stating " that the result in the Circuit Court of Appeals depended on the accidental composition of the Court ".

No significance seems to be given to the fact that a *jury acceptable to both parties returned a unanimous verdict.*

That Judge Morton in the District Court at the close of the evidence, denying the defendant's motion for a verdict for the defendant, which was argued by both counsel at that time, stated :

> " What I wanted to hear argument about was upon the point whether the case was clear enough for the defendant so that I should depart from the usual custom which I have here of sending the case to a jury and taking an alternative verdict, and sending it up in that way. While I think it is pretty doubtful whether there is any evidence of negligence, I don't think it is so clear that there is not, that in a case that has been so expensive to try as this I shall direct a verdict now." (Rec. p. 75–6.)

It is worthy of mention that Judge Morton's conclusion that the " commanders lost their heads and behaved with incredible folly " was not stated until three months after the motion was argued to set aside the verdict, and is not reconcilable with the views he entertained and expressed at the time of the trial, when the evidence was fresh in the mind of the Court.

It is not unusual for one member of the Court of Appeals to differ with the others on a matter of evidence and certainly affords no reason for a review by this Court.

It is respectfully submitted that the defendant's petition presents no proper ground for a writ of certiorari to the Circuit Court of Appeals and the plaintiffs pray that the petition be dismissed.

CHAS. F. PERKINS,
PAUL F. PERKINS,
Attorneys for the Respondents.

DISTRICT COURT OF THE UNITED STATES,
DISTRICT OF MASSACHUSETTS.

No. 1425 Law.

Donald Page et al., Administrators,
v.
United Fruit Company et al.

MOTION OF DEFENDANT NORTHERN RAILWAY COMPANY TO VACATE JUDGMENT.

April 18, 1925.

The defendant Northern Railway Company says that it intends to petition the United States Supreme Court for a writ of certiorari to review the decision of the Circuit Court of Appeals for the First Circuit on its petition for a rehearing, and that it is moving the said Circuit Court of Appeals to recall the mandate, wherefore the said Northern Railway Company moves that the judgment for the plaintiffs heretofore entered in this court in accordance with the terms of the mandate be vacated.

By its Attorneys,
STOREY, THORNDIKE, PALMER & DODGE.

A true copy.
Attest: JOHN E. GILMAN, Jr.,
[SEAL] *Deputy Clerk.*

[Endorsed:]

No. 1425 Law 1425 Law
Donald Page, et al., Administrators
v.
United Fruit Company, et al
Motion of Defendant Northern Railway Company to Vacate Judgment
United States District Court, Mass. Dist.
Filed in Clerk's Office Apr. 18, 1925

Aug. 5, 1925

The within motion may be substituted as an exact copy of the original motion filed April 18, 1925, which original has been lost or mislaid. Chas. F. Perkins,
Pltfs. Atty.

Substituted for original Filed Apr. 18, 1925

UNITED STATES DISTRICT COURT.

LAW DOCKET.

No. 1425 Law.

Title of Case. Contract or Tort.

Michael B. Ryan
(H. Anton Bock and Donald Page, Admrs.)
v.
United Fruit Company et al.

Attorneys.

Charles F. Perkins
Paul F. Perkins,

Robert G. Dodge,
Raymond S. Wilkins,
Storey, Thorndike, Palmer & Dodge.

Date Month	Day	Year	Filings—Proceedings.

EXTRACT FROM DOCKET ENTRIES.

* * * * * *

Mar 20 1925. Mandate of United States Circuit Court of Appeals received and filed, judgment of District Court in favor of Northern Railroad Co. is vacated; verdict in its favor is set aside and case remanded with directions to enter a verdict, and judgment for the plaintiff as to it with costs. Judgment of the District Court in favor of United Fruit Company is affirmed with costs. Costs in Circuit Court of Appeals to be satisfied under direction of District Court taxed in favor of Donald Page, et al, Administrators, and against the Northern Railroad Company at $298.40 and in favor of United Fruit Company against Donald Page et al., administrators at $20 filed.

23 Plaintiff's motion for entry of judgment in accordance with mandate and for issuance of execution filed.

23 Morton, J. Motion for entry of judgment allowed; judgment on the alternative verdict for plaintiffs against Northern Railway Co. of Costa Rica in the sum of $27,833.33 damages and

interest and for its costs taxed at $448.85; judgment for the defendant United Fruit Company and for its costs taxed at $ (entered.)

Apr 18 1925 Agreement on taxation of plaintiff's costs filed.

22 Motion of deft. Northern Railway Co. to vacate judgment filed.

27 Brewster, J. Heard on motion of defendant, Northern Railway Co. to vacate judgment; taken under advisement. (entered.)

May 5 Brewster, J. Motion to vacate judgment for plaintiff allowed and judgment accordingly vacated. (entered)

June 8 1925 Motion of deft. Northern Ry. Co. to continue case for judgment, filed.

Aug. 5, 1925 Plaintiff's notice of exception to order allowing defendant's motion to vacate judgment, filed.

DISTRICT COURT OF THE UNITED STATES,
DISTRICT OF MASSACHUSETTS.

I, John E. Gilman, Jr., Deputy Clerk of the District Court of the United States for the District of Massachusetts, and during the temporary absence of the Clerk in charge of the Clerk's Office of said Court, and the custodian of its files and records, do hereby certify that the foregoing is a true copy of an Extract from the Docket Entries, in the cause in said District Court, entitled,

No. 1425 Law,

Michael B. Ryan,
(H. Anton Bock and Donald Page, Admrs.)
v.
United Fruit Company,

now pending in said District Court.

In testimony whereof, I hereunto set my hand and affix the seal of said Court, at Boston, in said District, this third day of August, A. D. 1925.

JOHN E. GILMAN, JR.,
Deputy Clerk.

[SEAL]

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

No. 1771.

Donald Page et al., Administrators,
v.
United Fruit Company et al.

MOTION OF DEFENDANT NORTHERN RAILWAY COMPANY TO RECALL MANDATE.

The defendant Northern Railway Company says that it intends to petition the Supreme Court of the United States for a writ of certiorari to review the decision of this court on the petition of the said Northern Railway Company for re-hearing, wherefore it moves that the mandate to the District Court for the District of Massachusetts be recalled and the judgment heretofore entered in the said District Court in accordance with the provisions of the said mandate be vacated.

By its Attorneys,
STOREY, THORNDIKE, PALMER & DODGE.

CLERK'S CERTIFICATE.

I, Arthur I. Charron, Clerk of the United States Circuit Court of Appeals for the First Circuit, certify that the foregoing is a true copy of a motion to recall mandate presented to, and denied by, said United States Circuit Court of Appeals for the First Circuit on April 22, 1925.

In testimony whereof, I hereunto set my hand and affix the seal of said United States Circuit Court of Appeals for the First Circuit, at Boston, in said First Circuit, this third day of August, A. D. 1925.

[SEAL] ARTHUR I. CHARRON, *Clerk.*

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Supreme Court of the United States

OCTOBER TERM, 1926.

No. 136.

NORTHERN RAILWAY COMPANY, *Petitioner*,

v.

DONALD PAGE ET AL., ADMINISTRATORS, *Respondents*.

WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENTS' BRIEF.

We have referred to the respondents throughout the brief as plaintiffs and to the petitioner as defendant. The plaintiffs are the administrators of the estate of M. B. Ryan, the original plaintiff. The action was brought for damages for personal injuries received by Ryan in Costa Rica.

We understand that the only question to be reviewed by this Court is whether there was any evidence of negligence by the defendant that was the proximate cause of Ryan's injuries. The errors assigned by the plaintiff in the Circuit Court of Appeals all relate to the rulings of the District Court that there was no evidence of the defendant's negligence (Rec. p. 83).

HISTORY OF THE COURT PROCEEDINGS.

The trial of the action in the District Court for the District of Massachusetts came before Morton, J., with a jury. On May 3, 1923, the jury returned a verdict for Ryan for the sum of twenty-five thousand dollars ($25,000) (Rec. p. 9).

On May 5, 1923, the defendant filed a motion to set aside the verdict "as not warranted in law" (Rec. p. 72). As shown by the record, no question was raised by the defendant that the amount of the damages assessed was excessive. The record states (p. 11):

> "It was not disputed that the evidence of damages was sufficient to warrant a verdict for the amount assessed by the jury."

The defendant's motion to set aside the verdict was argued June 25, 1923 (Rec. p. 72). It was granted, but not until September 6, 1923 (Rec. p. 72). On the 31st day of October, 1923, Ryan died, and on December 22, 1923, the plaintiffs filed a motion that the action be revived, and that they as administrators of Ryan be joined as plaintiffs and be permitted to prosecute the action (Rec. p. 10). The defendant's counsel thereupon as stated in the defendant's petition for rehearing "caused careful inquiry to be made as to whether by the law of Costa Rica the cause of action survived, and in particular submitted the question to one of the leading members of the Costa Rican Bar, who rendered a written opinion" thereon (Deft's petition for rehearing, Rec. p. 114).

The motion was allowed on January 31, 1924 (Rec. p. 10), without objection by the defendant's counsel (Rec. p. 95), and the defendant saved no exception. There is no evidence of the law of Costa Rica relating to the survival of actions. There is no evidence of what relatives of Ryan survived him. The issue of whether or not the action survived the death of Ryan was *tendered* by the plaintiffs when their motion was filed to revive the action.

Upon that motion the plaintiffs had the burden to prove their allegations affirmatively, including the law of Costa Rica if survival depended on that law, and if the survival of the action depended upon the existence of certain heirs of Ryan, the burden was on the plaintiffs to show it, and also other facts, including their authority as administrators.

If the defendant wished to contest the plaintiffs' motion to

revive the action upon the ground that its survival depended upon the law of Costa Rica, and that Ryan left no heirs in the "direct line of ascent or decent," it should have demurred or filed a plea in abatement at the proper time.

The defendant saw fit to take it for granted that the facts existed upon which it says the allowance of the plaintiffs' motion depended, instead of requiring proof of the same, when it had the legal right to do so, if the facts are material at all.

The defendant makes no contention that the *facts have changed* relevant to the questions it now seeks to raise since the motion to revive the action was filed and allowed. After the defendant had been advised upon all the questions which it now seeks to raise and occupied about six weeks in considering the effect of the motion, its counsel voluntarily "suffered the same to be allowed."

The bill of exceptions was "*filed* and allowed on March 12, 1924" (Rec. p. 11), without objection by the defendant. The defendant states in its petition for rehearing (Rec. p. 113) that it "suffered the bill of exceptions to be allowed in its present form." While the defendant uses the expression that it "suffered" the plaintiffs' motion to revive the action, and the bill of exceptions to be allowed, nevertheless it *admits that it gave its consent to both.* The plaintiffs' petition for a writ of error to the Circuit Court of Appeals was filed April 30, 1924 (Rec. p. 82); the citation was issued on May 2, 1924 (Rec. p. 84), and served on the *defendant's attorney personally* (Rec. p. 84), *without any reservation* of rights under said motion to revive the action which was argued on the merits before the Court of Appeals at great expense to the plaintiffs. The District Court made a special effort to send the case to the Court of Appeals in such form that final judgment on the merits could be entered in that Court.

The Court stated after referring to the case as being expensive to try: "I shall let the case go to the jury and take special findings, and if they find for the plaintiff take an alternative verdict for the defendant so that the final judg-

ment can be entered in the Court of Appeals." (Rec. p. 63.) The Court further stated at another time: "I should like to put this case in such shape that you can get final judgment on it in the Court of Appeals." (Rec. p. 64.)

The counsel for the parties acquiesced in this course and the bill of exceptions was allowed by the Court upon that understanding. The plaintiff's exceptions were sustained in the Court of Appeals and the opinion of the Court reported in 3 Y. R. [2d] 747 reversing the decision of the District Court and ordering the entry of a verdict and judgment for the plaintiffs was filed on January 6, 1925 (Rec. p. 96), *nearly a year after the order was made allowing the motion to revive the action.*

The defendant filed a petition in the Circuit Court of Appeals for a rehearing (Rec. p. 102), raising for the first time the question of the validity of the order of the District Court allowing the motion to revive the action.

The defendant's petition for rehearing was denied by the Circuit Court of Appeals on March 5, 1925, and a printed opinion was filed in the clerk's office on that date (Rec. pp. 94–5).

On March 7, 1925 (Rec. p. 97), the mandate issued to the District Court in accordance with the following judgment of the Circuit Court of Appeals: "The judgment of the District Court in favor of the Northern Railway Company is vacated, the verdict in its favor is set aside, and the case is remanded to the Court with directions to enter a verdict for the plaintiff in error as to it, with costs" (page 96). *It cannot be disputed that the defendant's counsel was informed and knew that the mandate was to issue and made no objection thereto.*

On March 23, 1925, the plaintiffs moved for judgment on the mandate in the District Court and for issuance of execution (Docket Entries, Rec. p. 101).

Defendant's counsel appeared when the *motion for judgment* was made and did *not oppose* it. The motion was allowed and thereupon judgment was entered for the plain-

tiffs on the mandate for the sum of $27,833.33 damages and costs taxed at $448.85 (Rec. p. 101).

On April 22, 1925, the defendant filed a motion in the Circuit Court of Appeals that the mandate be recalled and the judgment of the District Court be vacated, *which was heard and denied.* Certified copy of motion annexed hereto (Rec. p. 99).

On April 22, 1925, a motion to vacate the judgment was filed by the defendant in the District Court and was heard before Brewster, J., on April 27, 1925. Certified copy of defendant's motion to vacate judgment annexed hereto (Rec. p. 98). Docket entries (Rec. p. 101).

The original motion was mislaid or lost in the clerk's office, and a substituted motion was filed by consent of counsel August 5, 1925 (Rec. p. 100). The motion was opposed at the hearing by plaintiffs' counsel, but was allowed by the Court. Exception to the allowance was noted by plaintiffs' counsel (Docket Entries, Rec. p. 101).

THE QUESTION OF SURVIVAL OF THE ACTION IS NOT BEFORE THE COURT.

It is respectfully submitted that, after the trial of the action on the merits, it is too late for the defendant to raise the question that the action finally abated on the death of Ryan.

The right to question the survival of the action and the admission of administrators as parties plaintiff was waived by the defendant's failure to oppose the allowance of the motion to join the administrators. No reference to the question appears in the bill of exceptions. It was raised for the first time on the petition to the Circuit Court of Appeals for rehearing, and therefore it is not before this Court.

It is stated in Foster's Federal Practice, 6th ed., page 1194:

> "It seems that *any step* in the cause taken by the surviving party after the death of one or more of his

opponents, is a waiver of his right to object that the cause has not been revived."

Citing *Ex parte Story*, 12 Peters, 339.
Skillern's Executors v. *May's Executors*, 6 Cranch, 267.

In *Williams* v. *Bruffy*, 102 U. S. 248 at 255, the Court says: "In the elaborate argument of counsel in the case before us . . . no intimation was made of want of jurisdiction by the Court of Appeals" (State Court of Virginia), and the Court refused "to listen" to the objection to the jurisdiction of the State Court, citing *Skillern's Executors* v. *May's Executors*, and *Ex parte Story*, supra, and *Washington Bridge Company* v. *Stewart*, 3 Howard 413.

See also

Saltonstall v. *Birtwell*, [illegible] U. S. 54 at 70;

and

Hastings v. *Inhabitants of Bolton*, 1 Allen, 529.

The early case of *Ex parte Story*, supra, has frequently been cited with approval. The facts were substantially the same as those in the case at bar. The suit was brought in the U. S. District Court (which afterwards became the Circuit Court). The plaintiff died while the suit was pending. The suit was tried on the merits, and a decree was ordered for the defendant dismissing the bill. After the decree was entered, the plaintiff's executrix was joined as party plaintiff and appealed to the Supreme Court, where the case was heard and the decree reversed. The defendant then applied to the trial court to have the suit abated and to attack the right of the plaintiff's executrix to appear and revive the suit. The trial court refused to dismiss or abate the suit, and, upon application to the Supreme Court, the decision of the lower court was sustained on the ground that such application could not be heard after the trial on the merits.

The defendant's motion for rehearing by the Circuit Court of Appeals expressly states that after plaintiffs' motion to

join the administrators was filed, defendant's counsel appeared, took several weeks to examine the law, and sought the advice of eminent local counsel in Costa Rica; that he understood that by the law of that country the action survived only to heirs of the intestate; and defendant's counsel, instead of requiring the administrators to support their motion by evidence of facts which he believed to be essential, consented to the allowance of the motion and thereby waived the right to contest it.

The defendant in the case at bar, however, would have gained nothing by opposing the plaintiff's motion to revive this action and to become parties plaintiff, because the question of survival of the action is not governed by the law of Costa Rica.

THE SURVIVAL OF THE ACTION DEPENDED UPON THE LAW OF MASSACHUSETTS, THE FORUM.

The defendant's brief on page 16 states:

> "The Ruling of the Circuit Court of Appeals as to the Survival of the Action was wrong."

According to the authority of this Court, which the Circuit Court of Appeals followed, the law of the forum governs the survival of an action, provided it is begun in due time. In *Baltimore & Ohio R.R. Co.* v. *Joy*, 173 U. S. 226, at page 228, the question upon which the Court below desired instructions of this Court was:

> "Does an action pending in the Circuit Court of the United States sitting in Ohio, brought by the injured person as plaintiff to recover damages for injuries sustained by the negligence of the defendant in Indiana, finally abate upon the death of the plaintiff in view of the fact that, had no suit been brought at all, the cause of action would have abated both in Indiana and Ohio, and that, even if suit had been brought in Indiana, the action would have abated in that State?"

The action was held not to abate.

The Court said in discussing it:

"We think that the right to revive attached under the local law when Hervey brought his action in the State Court. It was a right of substantial value and became inseparably connected with the cause of action so far as the laws of Ohio are concerned. Was it lost or destroyed when, upon the petition of the railway company, the case was removed for trial into the Circuit Court of the United States?

"Was it not rather a right that inhered in the action and accompanied it when *in the lifetime* of Hervey the Federal Court acquired jurisdiction of the parties and the subject matter? This last question must receive an affirmative answer. . . ."

In *Gerling, Adm'r of Martin*, v. *Baltimore & Ohio R.R.*, 151 U. S. 673, the Court says at pages 692–3:

"But in the case at bar, the question whether the administrator has a right of action depends upon the law of West Virginia, *where the action was brought.*"

See also

Martin v. *Wabash R.R. Co.*, 142 Fed. Rep. 650.

The law of Massachusetts provided for the survival of actions for personal injuries under the Statutes of 1842, Ch. 89, Sec. 1, changing the common law rule (construed in *Hollenbeck* v. *Berkshire R.R.*, 9 Cush. 478), and later re-enacted in Public Statutes, Ch. 165, Sec. 1, now General Laws, Chap. 228, Sec. 1.

"A right of action simultaneous with the injury accrued to the intestate," . . . "subsequent death does not defeat it, but, *by operation of the statute*, vests it in the personal representative."

Battany v. *Wall*, 232 Mass. 138, at 140, citing and quoting *Hollenbeck* v. *Berkshire R.R.*, supra.

NO CASE CITED BY THE DEFENDANT PRESENTS ANY CONFLICT OF LAW WITH THE AUTHORITIES RELIED UPON BY THE PLAINTIFFS AS APPLIED TO THE FACTS IN THE CASE AT BAR.

Davis v. *N. Y. & N. E. R.R. Co.*, 143 Mass. 301 (hereinafter referred to as the "Davis Case"), upon which the defendant relies as an authority that the Massachusetts Statute (G. L.

228, Sec. 1) providing for survival does not apply to actions brought within the State to recover for injuries received outside of the State, is not in point.

It does not decide broadly that *all actions* brought to recover for injuries received *outside* the State fail to come within the Statute. On the contrary, it only decides that the cause of action must be *alive when brought* into the State.

In the Davis case the injured party died before the action was begun, and the cause of action was *not alive when the action was brought.* It had died in Connecticut with the person; it was extinct before the personal representatives sought to revive and maintain it in Massachusetts. The Court rightly took the view that the personal representatives virtually sought to *create* a cause of action in Massachusetts.

Such are not the facts in the case at bar. *Ryan brought* an action of tort in the District Court in Massachusetts while his cause of action was still alive.

Higgins v. *Central N. E. R.R.*, 155 Mass. 181, clearly states the distinction between the Davis case and those like the case at bar.

The Court says at page 178:

> "Suits brought to enforce rights of action which the deceased had, and which survived and passed from him to his administrator, differ essentially from those which this court refused to entertain in *Davis* v. *New York & New England Railroad*, 143 Mass. 301. In Davis' case the intestate had a right of action in his lifetime by the common law of the State of Connecticut, where he was injured; but by the law of Connecticut his right of action did not survive, and was extinguished at his death, while a penal action created by statute was substituted for it in that State."

In *Whitford* v. *Panama R.R. Co.*, 23 N. Y. 465, the action was brought, after the death of the injured party, by his personal representatives. The cause of action arose in New Grenada, where no survival was provided by law. The Court held that no cause of action existed after the decedent's death and that no action could be brought in New York State by his representatives.

In *Needham* v. *Grand Trunk Ry. Co.*, 38 Vt. 294, no action

was begun in the lifetime of the injured party. The accident occurred in the State of New Hampshire, where the common law prevailed and the cause of action did not survive. An action was brought by the administrators in Vermont, where the law provided for the survival of actions for personal injuries. The Court held that the action could not be maintained.

In *Mexican Central Ry. Co.* v. *Goodman*, 20 Tex. Civ. App. 109, the injury occurred in Mexico, where a suit was begun by the injured party, but where it did not survive his death. Subsequently his personal representatives began an action in Texas for the same cause where such actions survived, but the Court held that the action could not be maintained for the reasons set forth in the preceding cases. Like the Davis case, the personal representatives sought to obtain the benefit of a distinct and independent statute which would virtually allow them to create a new cause of action.

In *O'Reilly* v. *New York & New England R.R. Co.*, 16 R. I. 388, no action was begun in the lifetime of the injured party, but by the law of the State where he received his injury, namely, Massachusetts, a cause of action for personal injuries survived. An action was brought by the decedent's personal representative in Rhode Island, where, as well as in Massachusetts, a cause of action of that kind survived. Therefore, both the *lex loci* and the *lex fori* provided for the survival of the cause of action and no conflict of law was presented. The law of the forum finally determined the question of survival. The statement of the Court quoted by the petitioner at page 16 of its petition, reading: "The cause of action accrued in Massachusetts . . . if it no longer exists there, it no longer exists here" is true, but it is only a half-truth. It is true if the injured party dies before he brings his action (which was the fact in that case); but it is not true if he brings his action and then dies while it is pending (which is the fact in the case at bar, thereby distinguishing the two cases). The law of the place where the injury was received was material only upon the question whether the cause of action was still alive in Massachusetts when the action, which was transitory in nature,

was begun in Rhode Island, in which event the law of the latter place, the forum, governing the survival of actions could be applied. The Court held that the cause did still exist in Massachusetts, and that as the *lex fori* (the law of Rhode Island) provided for survival, the action would not abate.

Clough v. *Gardiner*, 111 Misc. (N. Y.) 244; affirmed 194 App. Div. 923, cited by the defendant, supports the plaintiff's contention that the law of the forum is the test of survival; since in this case, even though the *lex loci* provided for the survival of such a cause of action, the *lex fori* did not; accordingly the action was held to abate. That case presents the converse of the facts in the preceding cases, and illustrates the same principle of law that applies in all.

THE DEFENDANT CONTENDS THAT THE FOLLOWING CASES ARE IN CONFLICT WITH THE DECISIONS IN *BALTIMORE & OHIO R.R. CO.* v. JOY and *GERLING, ADMINISTRATOR OF MARTIN* v. *BALTIMORE & OHIO R.R. CO.*, supra:

Patton v. *Brady*, 184 U. S. 608, 612:

The cause of action arose in Virginia under a Federal statute. An action at law was brought in the Circuit Court in Virginia to recover money paid to a collector of Internal Revenue for taxes paid under protest. The defendant died while the case was pending in the Supreme Court, whereupon the plaintiff took steps to revive this action and the executrix of the deceased was substituted as a party defendant. The new defendant contended that the action had abated upon the death of her testator.

In passing upon this contention, the Court was not called upon to decide whether the law of one State or of another State controlled, inasmuch as both the *cause* of action and the *action* arose in the same State, to wit, Virginia. Therefore, the language of the Court bearing upon that point is a mere dictum; and it is of value only as read in the light of the earlier authority of *Baltimore & Ohio* v. *Joy*, ante, cited

thereunder as approved, which flatly decided that where a conflict of law between States as to survival does exist, then the law of the forum prevails. From this it follows that the language of the Court, at page 612:

> "by the law of the State in which the *cause* of action arose"

must, in order to be consistent with the authority it approves, be taken to mean "the law of the State in which the *action* arose" without intending to distinguish between the locus of the *cause* of action and the forum of the prosecution of the *action* itself. The Court had no occasion to distinguish between the *cause* and the *action* in order to decide this case.

Stratton's Independence, Ltd., v. *Dines* (C. C. Col.), 126 Fed. Rep. 968; affirmed 135 Fed. Rep. 449:

While in this case the Court said,

> "where the complaint is an action against executors to recover for alleged false representations made by the decedent shows that the representations were made in England, the law of that country governs, and under such law the cause of action did not survive,"

yet the Court did not decide the case upon that ground; for its decision was based upon the Statute of Colorado, where the action was brought, which provided that only *pending actions* of this kind should survive. Since this action was not pending in the lifetime of the deceased, the Court held that the action could not be maintained under the Statute of Colorado, the law of the forum.

Sanders v. *Louisville & Nashville R.R. Co.* (C. C. A. 6th Circuit), 111 Fed. Rep. 708:

This action was brought on the death statute of Tennessee. All the parties authorized by the statute to sue and having a legal right to recover had died. A plea in abatement was sustained and the action dismissed.

Michigan Central R.R. Co. v. *Vreeland*, 227 U. S. 59:

This was an action for personal injuries under the United States Employees Liability Act in favor of railroad employees. As this cause of action was created by a Federal statute, its survival depended upon the Federal statutes, which did not provide for survival.

The case of *Van Choate* v. *Gen'l Electric Co.*, 245 Fed. Rep. 120, was a suit for the infringement of a patent and is not in point.

Slater v. *Mexican National R.R. Co.*, 194 U. S. 120:

The injury upon which the cause of action arose, was received in Mexico. Under the laws of Mexico, a right of action was given for injuries resulting in the death of a person in favor of the surviving wife and minor children. The action was in the United States Circuit Court in Texas. The plaintiffs were the widow and children of Slater, who was killed through the defendant's negligence in Mexico. The Court held that the action could not be maintained on account of the dissimilarity of the law of Mexico and Texas; that the courts of the United States had no power to make a decree of the kind contemplated by the Mexican statutes. To do so would have been to give the plaintiffs the benefit of a totally new and different cause of action.

Upon a careful reading of the cases cited by the defendant we can find no conflict of authority, and respectfully submit that the following statement in the defendant's petition (p. 5) is clearly wrong:

> "Upon the fundamental question whether the survival of a cause of action for personal injuries depends upon the law of the place where the injuries were received or upon the law of the forum the federal authorities are conflicting and indecisive";

and that it presents no question for review by this Court.

SETTLEMENT WITH THE GOVERNMENT OF COSTA RICA.

The defendant contends that it was released from liability by the transactions between Ryan and the representatives of the Costa Rican Government, on the theory that the defendant and the Government were joint tort-feasors and that by the settlement with that Government the defendant was released from liability.

The defendant's answer contains the following allegation:

> "Further answering, the defendants say that the plaintiff has received the sum of ten thousand dollars from the Republic of Costa Rica as compensation for the injuries referred to in the declaration, and has *given a release to the said Republic* and for that reason cannot maintain this action" (Rec. p. 8).

This is *matter in avoidance* of which the defendant has the burden of proof.

The defendant must show:

1st. That Ryan had a claim that was enforceable in the Courts against the Government of Costa Rica.

2d. That the agreement was for settlement of the identical and entire claim in suit in this action.

3d. That the payment was not a gift *prompted by diplomatic considerations.*

4th. That the Government of Costa Rica is a tort-feasor.

1st. THE DEFENDANT FAILED TO SHOW "THAT RYAN HAD A CLAIM THAT WAS ENFORCEABLE IN THE COURTS AGAINST THE GOVERNMENT OF COSTA RICA."

This question involves one of fact. It is certain that the claim would be unenforceable in the Courts of *this country.*

The only evidence in the case concerning the right to enforce the claim in the Courts of Costa Rica consists of the following testimony of Roscoe Pound:

> "Q. 14. . . . Is there any way to enforce the judgment against the state?" (referring to the state of Costa Rica).

A. "Well, the same way in which a judgment of the court of claims can be enforced, or not the same way, but analogous. It is analogous by the Government appropriating to pay the judgments which are rendered against it. In that way the Courts have no control over the revenues and no execution is possible." (Rec. p. 61.)

Upon that evidence, the jury could have found that the claim was unenforceable in the Costa Rican Courts.

Therefore, the Court could not properly rule that as matter of law the claim was enforceable.

The Court would have committed no error to have refused such a request, which as the record shows was not in fact made by the defendant.

2d. THE DEFENDANT FAILED TO SHOW "THAT THE AGREEMENT WAS FOR SETTLEMENT OF THE IDENTICAL AND ENTIRE CLAIM IN SUIT IN THIS ACTION."

This question involves one of fact for the jury. We contend that the only subject of settlement discussed by Ryan and the representatives of Costa Rica was a provision for *immediate surgical and medical treatment for his eyes*, and to that alone all correspondence related. It had no reference whatever to damages for other physical injuries, loss of employment, pain and suffering.

The evidence in the case at bar is that in 1918 the Costa Rican Government through its representative proposed to pay to Ryan the sum of $10,000 in monthly instalments of $500 each, because of the friendly relations between Ryan and Tinoco, the President of the Government of Costa Rica, which Government was afterwards overthrown by an insurrection (Rec. p. 59). The payments of $500 a month were made *until the Tinoco Government was overthrown* (Rec. p. 59), at which time they amounted to $6,000. The payments were to begin September 1, 1918 (Rec. p. 75). $6,000 was paid at the rate of $500 a month (Rec. p. 59), and as the payments continued from September 1, 1918, until the Tinoco Government was overthrown, that Government

must have ceased to exist *about September 1, 1919.* Ryan had no further transactions directly with the Government or its representatives, and consequently the original promise made to Ryan was never fulfilled by *that Government.*

Ryan testified that Tinoco was "a friend of his"; that he (Ryan) was in Costa Rica conferring with the President about plans for a colony of Belgian War refugees then in England (Rec. p. 12); that he was met on his arrival in New York after the accident by one Pisa, a representative of President Tinoco, who was directed by the President to take Ryan to "*the best eye surgeon,*" and to spare "*no reasonable expense*" . . . "*to get my sight back*"; that Pisa stated that they stood ready to pay all reasonable expense "to get me on my feet again *so that I could go on with the Belgian Colony*" (Rec. pp. 57–8, Q. 175–177); that pisa then referred him to Lara, a diplomatic agent of Costa Rica living in New York, stating that Lara would take care of all expenses *in connection with these operations* (Rec. p. 58); that at first it was suggested by Lara that he (Ryan) would have to go to Europe for treatment because several of the eye specialists referred to were engaged in the War, but later specialists at home were selected and it was agreed to allow him ten thousand (10,000) dollars for medical and surgical treatment.

> "But he (Lara) said they *denied all responsibility* for this accident and it was to *be not considered as damages* but it was to be considered *more as a gift to take care of this immediate necessity of surgical operations and medical attention and nurses and so forth*" (Rec. p. 59).

Lara also said:

> "*Any damages . . . we don't consider this damages, any damages you will have to get out of the Railroad Company*" (Rec. p. 59).

Ryan reserved his rights against the defendant in his transaction with the officials of Costa Rica.

The defendant admitted it at the trial.

The Court stated:

"I am inclined to instruct the jury to report whether they find that he (the plaintiff) reserved his right against the railroad when he settled with Costa Rica.

"Mr. DODGE. Your Honor need not bother the jury with that question, because I don't question his testimony that there was a tacit understanding, not expressed, however *in the final agreement* as made. I contend that it had no legal effect, but I do not question, and I am willing to concede for the purposes of this case, that the jury would find that there was *intended to be a tacit reservation* of the right against this defendant, *an intention expressed in conversation before the documents were executed*" (Rec. p. 64).

The defendant contended that the testimony of Ryan was at variance with the written correspondence between him and the officials of Costa Rica, and therefore not admissible. We submit that it is not at variance with a fair and liberal interpretation of the correspondence. The claim to which the parties referred in their correspondence related solely to the *expenses of medical and surgical treatment of the eyes;*—it was distinct from damages for loss of employment, and mental and physical suffering. The defendant was not a party to the written correspondence relied upon. They were communications between Ryan and strangers or between the representatives of the two governments.

Barreda v. *Silsbee*, 21 How. 146, 165–170.
Libby v. *Company*, 67 N. H. 587–588.

The entire agreement between Ryan and Lara was *verbal* as stated in Lara's letter to Ryan, and the provisions were that the payments were to be a gift, that damages, as such, must be obtained from the defendant Northern Railway Company.

There was no paper given by Ryan to Lara purporting to be a receipt, release or voucher of any form.

Lara refers in his letter to the agreement "as per our *verbal agreement*" (Rec. p. 75) and Ryan in his letter to Lara (Rec. p. 76) refers to the *same interview*. The defendant admits that this verbal agreement contained the reserva-

tion of the claim against the defendant. The letters referred merely to the amount and time of payments; they did not *constitute the agreement itself.*

The evidence is clear that as a matter of fact the Costa Rican officials and Ryan at all times understood that the payments of money were voluntary; that the money was paid for a *specific object*, namely medical and surgical treatment for the purpose of getting Ryan back to work for the interests of the Government.

In view of the foregoing evidence, it is clear that the Court could not rule that there was no evidence that the agreement was made for the specific purpose stated—to provide for immmediate medical and surgical treatment for Ryan's eyes.

3d. THE DEFENDANT HAS FAILED TO SHOW "THAT THE PAYMENT WAS NOT A GIFT PROMPTED BY DIPLOMATIC CONSIDERATIONS."

That likewise involves a jury question. The testimony of Ryan, and the written protestations of the Costa Rican officials that the payment was purely for diplomatic considerations, were substantial evidence of it. The Court could not rule that there was no evidence of a gift, in the light of this record.

The letter containing the promise to pay (Defendant's Exhibit C, Rec. p. 75) corroborates the plaintiffs' testimony that the transaction was a diplomatic one, and not based *upon the recognition of any possible legal obligation for a tort.*

The failure of the Tinoco government to fulfill its promise released Ryan from his obligation, if any, under the original transaction.

Two years after the Tinoco government was overthrown and the payments to Ryan ceased, the United States Government at Ryan's request took up his matter with the new Costa Rican government, with the result that the Foreign Relations Department of Costa Rica wrote to the Secretary of State of the United States:

"As your Excellency actually knows the legal situation created by the acts and decrees of the Tinoco Administration, it is unnecessary to state that the agreement entered into with Mr. Ryan *has no legal standing and therefrom it is derived from the fact that we cannot recognize proceeds for the sum unpaid.* However, *my Government being inspired of equitable sentiments and desirous of showing with facts the goodwill towards the American citizens in general and specially to one who by the impolicy of the Costa Rican Troops was injured*, such as losing the eyesight, is willing to pay to Mr. Ryan the sum of *four thousand American gold*, on *successive monthly installments of $500 dollars to commence on the date of the first payment*" (Rec. p. 74).

4th. THE DEFENDANT HAS FAILED TO SHOW "THAT THE GOVERNMENT OF COSTA RICA IS A TORT-FEASOR."

Under the law of Costa Rica, the terms tort or tort-feasor are not known (Professor Pound, p. 60), and it is submitted that only a natural or corporate person can be a tort-feasor. A sovereign state which can be coerced only by means of war cannot be technically a tort-feasor. The failure, therefore, of the defendant to show that some joint tort-feasor had been released, negatives any charge of error on the subject of settlement.

NO SOVEREIGN STATE IS OR CAN BE A TORT-FEASOR IN A TRUE SENSE OF THE TERM.

The settlement of a claim against a sovereign state does not operate to release a wrongdoer.

On this point Professor Pound testified:

"The decisions that I looked at in Costa Rica seemed to go on the basis of a general provision of the constitution as to the equity of men and the provision about the State being a moral person, and those decisions indicate, in fact they establish, a suability of the State for wrongs generally as far as I can see, as far as their language goes, and certainly under Chapter 1048 of

> the Code of Costa Rica where applicable. . . . This judgment obtained against a State is certainly on the same footing, to use an analogy, according to our law, as a judgment from the Court of Claims. . . . The proceedings are ordinary civil proceedings, but the best analogy that I can give you to the nature of the transaction would be the Court of Claims, because the judgment isn't enforceable by execution or by ordinary process, but the judgment is exactly on the same basis.
>
> "Q. 14. . . . Is there any way to enforce the judgment against the State? A. Well, the same way in which a judgment of the Court of Claims can be enforced, or not the same way, but analogous. It is analogous by the Government appropriating to pay the judgments which are rendered against it. In that way the courts have no control over the revenues and no execution is possible" (Rec. p. 61).

The release of a joint wrongdoer is no bar to a suit against another unless the claim could be enforced by judgment of Court against the party released.

As a judgment of Court cannot be obtained and enforced against a sovereign state, a release of a claim against it, much less a settlement of a diplomatic claim, is no bar to a suit against a wrongdoer.

In the case of *Pickwick* v. *McCauliff*, 193 Mass. 70, the plaintiff was an employee of the Commonwealth, and was injured by the negligence of an independent contractor. The plaintiff made a settlement with the Commonwealth, and afterwards sued the contractor. The Court stated at page 75:

> "The remaining question relates to the effect of the paper signed by the plaintiff agreeing, in consideration of receiving his pay while absent from duty and being indemnified for hospital expenses and doctors' bills, to make no claim upon the Commonwealth for the injury. We assume in favor of the defendant that the paper, though not under seal, operated as a release of any claim which the plaintiff had against the Commonwealth. It is well settled that a release of one of several joint tort-feasors will operate as a bar to a recovery against the others. But in order to have that effect we

think that the party to whom the release is given must be one against whom an action would or might lie, and that a claim has been made for or on account of the alleged tort. It is not necessary that it should appear that he was in fact liable (*Leddy* v. *Barney*, 139 Mass. 394), or that there should have been concert of action amongst the alleged joint tort-feasors. *Stone* v. *Dickinson*, 5 Allen, 29. A gift from one of the joint tort-feasors will not operate to bar a recovery against the others. *Leddy* v. *Barney*, supra. There must be something in the nature of a claim on the one hand, and of possible liability under the rules of law applicable to the matter on the other, in order to render the release a bar to recovery against other joint tort-feasors. In the present case no action could have been maintained against the Commonwealth for the alleged injury. *Murdock Parlor Grate Co.* v. *Commonwealth*, 152 Mass. 28. It was not legally answerable in tort to the plaintiff or to anyone, and besides, no claim was made by the plaintiff against the Commonwealth. What was received by the plaintiff from the Commonwealth must be regarded therefore as in the nature of a gift or gratuity, and not as something paid in satisfaction of an injury for which it was or might be liable according to established rules of law, or of a claim made upon it by the plaintiff."

In the late case of *Cormier* v. *Worcester Street Railway Company*, 234 Mass. 193 at 197, the Court expressly recognizes that in the absence of *legal responsibility* of the party from whom payment is received, that a settlement or release is no bar to a suit against a wrongdoer.

Neither the old nor the new Government would admit any responsibility for the accident. The Tinoco Government, in Defendant's Exhibit C, Record, page 75, states that it

> "does not in the slightest degree make itself responsible for the accident that happened to you" . . . "since that responsibility rests only on those who meant to revolt the country at large."

The new Government, in its letter Defendant's Exhibit B *a*, Record, page 74, accuses the Tinoco Government troops of responsibility, saying that they made "an insensate discharge on the passengers."

No weight should be given to their opinions of each other. They were governed by feelings of keen hostility against each other, and by a determined purpose to defend and justify their own conduct.

The *burden of proof was upon the defendant* to show a release by the plaintiff of an enforceable legal claim against a joint tort-feasor. Certainly it could not be held that the jury was required to find, upon this state of the evidence regarding the payment of money, that the defendant had sustained such burden.

It cannot reasonably be contended that Ryan and the Costa Rican officials understood that Ryan was receiving satisfaction for a legal claim for damages for a wrong committed by the Government.

The jury found the damages to be $35,000, from which, with Ryan's assent, was deducted $10,000 in mitigation of damages.

With the exception of the case of *Metz* v. *Soule Kretsinger & Co.*, 40 Iowa 236, the cases cited in the defendant's brief as we understand do not include any decided case in which the release relied upon as a bar to the suit was given to a sovereign state or to any person other than one against whom an action at law would lie and in which a judgment if obtained would be enforceable.

In that case, the facts were that the plaintiff made application by petition to the General Assembly of the State of Iowa, and claimed damages for personal injuries, and upon such application the General Assembly appropriated a sum in payment of such claim which the plaintiff accepted.

The Court ruled that the plaintiff, by prosecuting his claim against the State, as a *wrongdoer*, in the only way available to him, and by accepting the benefits of the act passed in his favor, is *estopped to deny* that the injury occurred *through the wrongful act of the State.*

In the case at bar there is no evidence that Ryan ever claimed that the *State* had done any *wrong.* The representatives of the Government took the initiative and *came to him and offered him help for medical and surgical treatment* so

that he might be able to return to his project of the Belgian Colony.

The case at bar is exceptional in that Ryan at the time of the accident was engaged in work of colonizing for the development of property in Costa Rica, which the *Government desired to promote,* and the President sought to have the work resumed as soon as possible and *Ryan's disability had to be removed before that could be done.*

The defendant was bound to satisfy the jury by a preponderance of the evidence:

1. That by the law of Costa Rica the Republic might be regarded a *tort-feasor*, and that an action of tort could be maintained against it and a judgment enforced.
2. That Ryan claimed that the Republic was a *wrongdoer* and that the money was paid for *that reason* and not that it was paid to Ryan as a gratuity.

The law is not contained in a *single statute or decision.* It consists of "a code based upon the French Civil Code of 1804 with certain supplementary legislation," which is "essentially declaratory of the civil law" (Rec. p. 54–5). The opinion of Professor Pound was the result of his examination and knowledge of the statutes, and of the decisions of the courts of Costa Rica, and his testimony was the only evidence in the case on that subject (Rec. p. 60–61–62).

Where the evidence of foreign law consists only in a *single statute or decision*, it is held that its construction is for the court; but where the evidence consists in several statutes or decisions, as it does in this case, the foreign law is a question of fact to be left to the jury.

> *Ufford* v. *Spaulding*, 156 Mass. 65, 66.
> *Electric Welding Co* v. *Prince*, 200 Mass. 386, 390.

The defendant asks this Court to rule that the jury were bound to find that the defendant had sustained the burden of proof and had established by a preponderance of the evidence the facts which were essential to constitute a release of a joint tort-feasor, and to be a bar to this action.

It amounts to a request that the Court rule *that the jury*

must give more weight to the evidence than it did, and sufficient weight to sustain the burden of proof.

We respectfully submit that the Court of Appeals did not err in its view of the law that governed the settlement, and in any event its opinion was no prejudice to the defendant, because the questions raised were facts for the jury, who found them adverse to the defendant.

DEFENDANT'S NEGLIGENCE.

The defendant contends that "there was not sufficient evidence of negligence on the part of the defendant to warrant the submission of the case to the jury."

Both the Passenger and Troop Trains Were Operated by the Defendant.

It was not disputed that the defendant was a common carrier and was on the day of the accident operating two trains of passenger cars, one carrying a Government armed military force, and the other occupied by armed insurrectionists and some civilians as passengers, including Ryan.

The passenger train was in the hands of the regular train men, the employees of the defendant (Rec. p. 12–13).

And also the troop train was run by the regular train crew employed by the defendant (Rec. p. 36, Q. 62–3).

The defendant was operating both trains.

At the close of the evidence the Court stated without the defendant's objection:

> "I regard the operation of the trains on the evidence as having been sufficiently under the control of the railroad so that they were bound to run them carefully. They were doing the operating" (Rec. p. 64; see Rec. p. 71).

For convenience of reference we will call the first the "troop train" and the other the "passenger train." The passenger train was the *regular daily east-bound* train from San José to Limon. It was seized by the insurrectionists at about 11.30 A.M. at Turrialba in Costa Rica on the day of the accident.

MOVEMENTS OF PASSENGER TRAIN.

The insurrectionists were armed and held the train at Turrialba until about 5.45 P.M.

The chief train dispatcher Powers testified on cross-examination:

> "X-Q. 25. Do you know what time the passenger train pulled out of Turrialba? A. It left Turrialba in the neighborhood of about 5.45." (Rec. p. 46.)

Some of the insurrectionists were aboard the train at all times at Turrialba and remained aboard when it left.

Ryan testified:

> "X-Q. 110. They didn't get on your train at Turrialba until the last minute, did they? A. These men?
> X-Q. 111. Yes. A. The men with the picks and shovels and *fellows with guns* were sitting up on there, and the fellows with whatever arms they had were up on top of the freight car quite a little.
> X-Q. 112. *Before you started?* A. Yes.
> X-Q. 113. And it was the men with the tools that jumped on at the last minute? A. Yes." (Rec. p. 26.)

It was claimed by the defendant that the passenger train was "*released*" by the insurrectionists when it left Turrialba at about 5.45 P.M.; but, according to the undisputed testimony, it proceeded to Torito, a few miles east of Turrialba, *with some of the armed insurrectionists aboard.* Therefore the passenger train must have been occupied by an armed enemy until about six o'clock in the evening.

At that time the troop train was at Las Lomas, about six miles from La Pascua, where the two trains met by order of the defendant (Rec. p. 14). The troop train left Limon at 3.30 P.M. (Rec. p. 13). The defendant's general manager, Chittenden, testified:

> "X-Q. 38. Before the troop train left Limon, the train men were informed, were they not, that the passenger train at Turrialba was in the hands of the revolutionists? A. Yes, sir. . . ."
> "X-Q. 42. And the commander of the troops and the

train crew knew that this passenger train was in the hands of the revolutionists? A. Yes, sir." (Rec. p. 47.)

The passenger train left the revolutionists at Torito and then proceeded to Peralta, a few miles farther east, so that as late as six o'clock in the evening the trains were about twelve or thirteen miles apart, the troop train at Las Lomas and the passenger train at Peralta, with La Pascua the meeting place about midway between them.

> "At Peralta conductor Ramsay received a message from the defendant's officials at Limon to pass a special train at La Pascua, a distance of five or six miles from Peralta. No information was given to Ramsay that the special train was carrying troops" (Rec. p. 14).

There was some confusion in the testimony about the messages from the passenger train.

Ramsay the conductor of the passenger train testified that he left a message at Peralta that "*some* revolutionary forces got off" at Torito (Rec. p. 52, Q. 25, X-Q. 27), thereby implying that others were still aboard.

Another witness testified that the message stated that "*all* the rebels have gotten off."

But whatever the message was, up to that time, about six o'clock in the evening, the passenger train was carrying an armed enemy of the Government, and only twelve or thirteen miles away from the troop train.

Movements of Troop Train.

The troops embarked at Limon and were

> "ordered to Turrialba to meet the rebels" (Rec. p. 13).

The train crew and the commanders of the troops knew that the passenger train was in the hands of the revolutionists (Rec. p. 47), and consequently the passenger train was the *objective* of the expedition.

The troop train left Limon at 3.30 P.M.; and before they left, the defendant's officials had received word that the insurrectos would hold the passenger train unless they were provided with another engine, which the defendant refused.

This message was received at about 1 o'clock (Powers, Rec. p. 43, X-Q. 20), two and one-half hours before the troop train left Limon (Rec. p. 13), and the jury were warranted in finding that the troops knew of the whole situation of the insurrectos before they left Limon.

The defendant's counsel stated in his opening to the jury, referring to this message:

> "And, furthermore, a large part of the message was to the effect that, 'If you send up another engine the rebels say they will let this one go.' You can imagine whether or not the railroad or the Government would choose to give the rebels another engine" (Rec. p. 40).

THE INSTRUCTIONS TO THE TROOP TRAIN WERE MEAGRE AND MISLEADING.

There were ample means of communication by telegraph and telephone between Limon and all stations on the road (Rec. pp. 30, 53).

The efforts of the officials at Limon to inform the troops that the enemy had left the passenger train and that it was occupied by civilians consisted of the testimony of the train dispatchers and the general manager.

The first message was sent to the troop train at Las Lomas according to the evidence (Rec. p. 50, Q. 17, 18).

The chief train dispatcher who was present at the time testified that the message was:

> "Engine 48 run Siquirres to Peralta as a special to meet extra east engine at Pasqua" (Rec. p. 49).

According to the testimony of the chief train dispatcher, this was the entire message to the troop train.

The assistant train dispatcher testified that he added that

> "Special 38 east has no revolutionists on the train" (Rec. p. 50).

The general manager testified that he telephoned *to a yard master* at Siquirres to tell the agent at Las Lomas

> "that there were non-combatants and non-combatant passengers, including women and children, on the passenger train" (Rec. p. 48, 49).

The commanders of the troops, therefore, from about 3.30 o'clock till six o'clock, that is, from the time they left Limon until they reached Las Lomas, a distance of about forty-four or forty-five miles, supposed that the enemy occupied the passenger train, and that it was at Turrialba, in the same situation as it was when the troop train left Limon.

The plaintiffs contend that the messages sent to Las Lomas were meagre and misleading.

The troop train was at Las Lomas at about six o'clock, and only six miles from La Pascua, the meeting point, where it arrived at about seven o'clock (Rec. p. 14 Q. 1, 2, and 3).

The jury could properly have found that there was nearly an hour after the troop train arrived at Las Lomas before it arrived at La Pascua, during which the officials at Limon could have given them *all the information in detail*, of the movements of the passenger train, its occupants, and of its freedom from the enemy.

Ample Time to Send Full Information.

The two trains at six o'clock or before were at stations having station agents with telephone and telegraph service. Each had but six miles to run and yet an hour elapsed before it reached La Pascua. Furthermore, it was in the control of the defendant to detain them indefinitely and until its officers had conveyed full and explicit information and instructions for safe transportation of the passengers.

The passenger train was known as the "regular" daily passenger train from San José to Port Limon (Rec. p. 12).

It was composed of five freight cars, a combination baggage and second-class passenger car, one or two first-class coaches, and a pay car, carrying gold, silver, currency, and express parcels (Rec. p. 12).

The daily west-bound train between San José and Limon was called the "regular" also (Rec. p. 13–14).

These two trains ("regular" east and "regular" west-bound) were referred to as the only "scheduled trains" at that time running between Limon and Turrialba (Rec. p. 14, Q. 3).

Grant testified that he heard Ramsay, speaking in English to one of the officers of the troops, call the passenger train the "regular" passenger train, and heard Veitch say substantially the same in Spanish (Rec. p. 16, X-Qs. 2–4).

Powers, the chief dispatcher, was present when a message was sent to the troop train at Las Lomas to pass a train at La Pascua (Rec. p. 49), and the evidence shows that *no other message* was sent. And he testified on direct examination that the message to the troop train was:

> "Engine 48 run Siquirres to Peralta as a special to meet *extra* east engine at Pasqua" (Rec. p. 49).

The record states:

> "The troop train arrived at Siquirres, a distance of about 38 miles from Limon, at about 5 P.M. and left at about 5.30 P.M., and ran to Las Lomas, a distance of about five or six miles, where orders were received to pass an 'extra' or 'special' train at La Pascua, a distance of about six miles away" (Rec. p. 14).

Dingledine, the assistant train dispatcher, is the only witness who testifies that it was expressly reported to the troop train that there were no revolutionists aboard the train to be met at La Pascua.

Chittenden, the general manager testified that he told the Governor:

> "Q. 44. Now, when you received word of the release of the passenger train, did you communicate that fact to the Governor? A. I did.
>
> Q. 45. Did he give authority for moving the train? A. He did.
>
> Q. 46. Was anything said at that time between you and the Governor regarding notification of this release being sent to the troop train? A. I reminded the Governor that he had a troop train—to the best of my recollection, I reminded the Governor that he had a troop train on the line. I say that because I told him practically where all trains were.
>
> Q. 47. Go ahead and tell us what your conversation with the Governor was. A. I told the Governor where various trains were on the line. As I remember it, the troop train was on the line at that time between Limon and Siquirres.

Q. 48. Was anything said about notifying the troop train? A. I told him he had better notify the troop train. He said he would. Afterwards he said he did." (Rec. p. 47–8).

Chittenden testified that some of his talks with the Governor were on the street (Rec. p. 31, Q. 8).

The following is Dingledine's testimony concerning the message to Las Lomas:

"Q. 18. *When, if at all, did you give instructions to the troop train to pass this down passenger train?* A. *I did at Las Lomas.*

Q. 19. *And what message did you send through to Las Lomas?* A. *Sent the conductor of the troop train a message.*

Q. 20. *What was it that you telephoned up there?* A. *First, put out a train order to meet the train at Pascua. I sent in a message which read something like this: 'Special 38 east has no revolutionists on the train.'*" (Rec. p. 50.)

At this point the Court, evidently surprised, interrupted to confirm what he thought he heard the witness say, with the question:

"Your order said 'special'?"

To which the witness replied:

"Special 33 [38] East has no revolutionists on board . . . or something to that effect." (Rec. p. 50.)

The witness brought no memoranda or records of train movements or orders with him, although he came from Costa Rica for the express purpose of testifying in this case.

The superintendent, Marsh, under whom the train dispatcher served and to whom the train dispatchers reported directly, testified as follows:

"The WITNESS. The orders were in writing. All orders to trains were issued in writing.

Q. 98. You don't mean by that that they were written and sent out in a written form from your office? A. Telegraphed to the operators, who wrote them out and handed them to the train crew and received a receipt,—that is, a signature. . . .

Q. 99. You said, I believe, that the train dispatcher had no written orders in his office. Did you mean to testify there were no records in the train dispatcher's office? A. No, sir.

Q. 100. Were there records kept? A. Yes, sir.

Q. 101. Of train movements? A. Yes, sir.

Q. 102. You said that the train dispatcher would make a notation of anything affecting train service. Is that correct? A. Yes, sir. (Rec. p. 51–52.)

Ramsay testified:

"At Peralta I received a train order to meet special west at Pascua." (Rec. p. 52, Q. 25.)

To summarize:

(1) The version of the message to the troop train as given by the *chief* train dispatcher, who was present when the meet orders were given, contains no statement that there were no revolutionists aboard.

(2) The assistant did not profess to quote the message verbatim; he said it was "something to that effect."

(3) The Railroad Company kept records of all movements of trains and orders for the same at all times, evidently very fully, as stated by the superintendent. It would be extraordinary if they omitted to do so at a critical time like this, *and yet the assistant train dispatcher brought none with him.*

(4) Not a member of the troop train crew was called as a witness in the case, or their absence explained, although the defendants had no lack of financial means and facilities to produce them.

(5) There was no lack of time or facilities for conveying to the troop train unambiguous messages, and any number of them, apprising the troops and the train crew of every detail of the situation in clear and convincing terms.

(6) The message as stated by Dingledine, which the jury may well have disbelieved, stated that there were no revolutionists on the "special" or "extra." This was most misleading. The troop train was a "special" or "extra," but the troops knew that the train sought by them was the overdue "regular" "scheduled" east-bound train.

(7) There was at that time out on the road the "special" train known as the "banana pick-up."

(8) The troops had received no word about the *regular* train when they arrived at Las Lomas; and why should they suppose that this meagre and ambiguous message could relate to the main object of their perilous expedition? It was a negative as to a "special"; and pregnant with an affirmative that the "regular," about which the message was silent, was still in the hands of the revolutionists.

The Circuit Court of Appeals stated (Rec. p. 88):

> "But, on the evidence, we think that it was open to the jury to find that the officers at Limon did not receive word that the revolutionists had left the passenger train until after 6 o'clock, when that train reached Peralta, and that, at that time, those in charge at Limon must have known that the troop train had left Siquirres some half-hour or more before; and that they also must have known that the governor could not then reach the troop train over his private 'phone or over any telephone line except that of the defendant (which it was not claimed that he did), and that no such communication was made by the governor to the troops; and that the testimony of Chittenden that he caused the yard-master at Siquirres to communicate with the agent at Las Lomas that women and children were on the passenger train could likewise have been disregarded, for there was testimony that the agent at Las Lomas could not be reached over the company's wires except from Limon."

The Court further stated (Rec. p. 89):

> "From the foregoing evidence it appears that Powers, the chief train dispatcher, testified that the order to the troop train was 'Engine 48 run Siquirres to Peralta as a special to meet extra east engine at Pascua,' and that Dingledine, his assistant, testified that the message also contained a statement that a 'special 38 east has no revolutionists on the train.' Because of this discrepancy in their testimony, it was for the jury to say whether the chief or the assistant dispatcher was correct as to what the message embodying the order contained; and in view of the testimony of Marsh, that a record of orders

affecting train service was kept in the train dispatcher's office at Limon and that it was the duty of the train dispatcher to keep records of anything that affected train service in any way, and that Dingledine testified that he did not keep records of such orders, it was open to the jury to disbelieve the testimony of Dingledine and find that the orders communicated by him to Las Lomas and Siquirres did not contain the information that there were no revolutionists on the east-bound or passenger train; and that if the messages had contained the information that there were no revolutionists on the east-bound or passenger train, the defendant would have produced the written record of the orders which the train dispatcher was required to keep at the Limon office, which it did not do."

It was an occasion when no pains should have been spared to prevent the troop train from meeting the passenger train until the occupants of each *knew* of the friendly character of the other.

To the troops, the passenger train was the equivalent of the enemy itself, and its presence was a challenge for an attack. All of which the defendant's general manager and its other officials at Limon well knew and they should have realized the state of mind of the commanders of the troops and the tension they were under.

As Judge Morton stated during his charge to the jury:

"At the same time we are to remember that this was an armed force (the troops) mobilized and proceeding into contact with the enemy; and at this time it was about 12 or 15 miles, not more than that, from where the enemy *were known to be assembled;* that this train had come forward only that distance from where the enemy were in some force, and that it was obviously a situation in which there could not fail to be a good deal of *tension and anxiety* on the part of the officers who were in charge of that movement, *a very nerve-wracking time and a very critical time when they are approaching as closely as that and had not yet made their first contact with the enemy; and in that situation they met this train coming down from this close-at-hand camp of the enemy*" (Rec. p. 67–8).

Judge Morton further stated (Rec. p. 68–9):

> "If you were a railroad official, Mr. Foreman, managing a railroad, bringing out a passenger train which was from one hostile area towards another area, the opposite area, and if you knew that troops were advancing towards the opposite area and that your train coming from that area would have to pass through those troops, and that the troops would believe that there were revolutionaries or enemies to them on the train, it is obvious you would have to *make that movement with the greatest of precautions.* It would be, to compare a small thing to a great one, *like passing a train across between the German and the Allied lines during the Great War.* It would be a movement out of one hostile zone into the opposite hostile zone, something which *obviously could not be done except with the very greatest precaution.* But that depends, you see, on whether the officers of the railroad knew that the officers in charge of the troops believed, or might well believe, that revolutionaries were coming forward on the passenger trains. And it is upon that point that the real issue of the case comes, as I understand the arguments of counsel."

How could the general manager in reason suppose that such a barren message as that testified to by the assistant train dispatcher would convey the information that the "regular" east-bound train which the troops were to attack—a train having cars carrying gold and silver and other valuables (Rec. p. 12), and attached to a locomotive demanded by the enemy—had undergone such a change in a few hours as to be released and to become a friendly train occupied only by civilians, including women and children?

The very fact that the message stated no particulars about the train, carried the idea that the "*special*," so called, was an unimportant one, and would not suggest its identity as the "*regular*" *east-bound train*, the train sought by the troops.

It is significant that the *chief* train dispatcher, in testifying to the contents of the message, did not say that it contained any reference to revolutionists or the absence of revolutionists.

The general manager assumed to discharge his grave responsibility of warning of danger, in the matter of life and

death, by taking the chance that his telephone message to a *yard master* in Siquirres would be in turn correctly repeated to others at Las Lomas, when there wasn't the slightest reason why he should not telephone or telegraph, or both, *directly with the occupants of the troop train*, and at length, and require that it be repeated for confirmation.

It is certain that the troops never received instructions that they were to meet the *regular* passenger train and that it was free from the enemy.

The jury were warranted in so finding from the fact that the troops prepared for the attack as soon as they sighted the passenger train (Rec. p. 14), and afterwards were ordered by the commanders to fire.

The Court stated in its charge to the jury:

> "We *are bound to believe* that the officers *did think* that that train had danger to their force in it, and on that account gave the order to fire" (Rec. p. 70).

The Circuit Court of Appeals stated in the opinion (Rec. p. 91):

> "*It is evident that* the *troops and their officers believed* that the passenger train contained revolutionists—otherwise it is practically impossible to account for their action."

The crew of the passenger train and its passengers were kept in ignorance that they were to meet a troop train.

> "No information was given to Ramsay (the conductor) that the special train was carrying troops" (Rec. p. 14).

Ryan testified:

> "X-Q. 123. Did you understand you were going to pass a train there (La Pascua)? A. No. I didn't know anything about it.
>
> X-Q. 124. You hadn't heard about that? A. No; I didn't hear anything about it." (Rec. p. 26).

The defendant's general manager therefore allowed these two trains, which meant danger to each other, to meet without suitable warning of the danger, and confusion was the result.

It was dusk at the time the trains met, and darkness was falling fast (Rec. p. 17 and 18).

Consequences to the Commanders if They Were Deceived.

They knew that if the enemy got to their rear they would be surrounded and Limon would be at the enemy's mercy.

They saw before them the train that they had been notified, when only about a dozen miles away, was occupied by the revolutionists whom their troops were sent to attack. They knew also that these revolutionists had refused to allow the train to leave Turrialba *only on condition that they were furnished with another engine.*

The passenger train consisted of freight and coaches to the number of eight or nine, and a pay car containing gold, silver, and currency and other valuables. Also it furnished an admirable barrier of defence. Why should the revolutionists surrender it?

The commanders must act promptly or they would be plunged into darkness.

The fact *alone* that they were ordered to fire is *conclusive evidence* that they *believed* the enemy occupied the train.

> "Conduct and word utterances may betray the knowledge or belief of the actor or speaker, in so far as the specific act or utterance is of a tenor which cannot well be supposed to have been willed without the inner existence of that knowledge or belief. For example, A's act of boarding a railroad train is some evidence of his belief as to the destination of the train. . . ."
>
> "For such instances of conduct including utterances, as evidence of knowledge or belief, there can be no general test of relevancy; ordinary experience usually suffices, without controversy, to tell us whether the inference is at least a fairly possible one, and therefore whether the evidence is admissible. Every trial illustrates the principle; and such judicial rulings as have been made are seldom of use as precedents."
>
> Wigmore, on Evidence, Vol. I, Chapter XI., Sec. 266.

The important thing is that the courts recognize that actions speak louder than words, and when coupled with

utterances that are consistent with the actions, as legal evidence, they are stronger still. This is especially true when the actions are reflex or approaching the reflex, or when the emergency demands immediate action.

The Court stated in the charge:

> "It cannot be supposed, says the plaintiff, that these officers simply started out to murder a lot of people in cold blood by turning on them the rifles of an armed military force. We are bound to believe that the officers did think that that train had danger to their force in it, and on that account gave the order to fire" (Rec. p. 70).

The Court of Appeals stated:

> "It is evident that the troops and their officers believed that the passenger train contained revolutionists —otherwise it is practically impossible to account for their action; and the jury might have found that inasmuch as Ramsay, the conductor, did not testify as to what he said to the officers in charge of the troops prior to the shooting, but did testify that when the shooting began he cried out that there were no revolutionists on the train, nothing of the kind was said until after the shooting began; that the troops and their officers never received any information as to the harmless character of the occupants of the train or received it too late and under such circumstances as to render it unavailable." (Rec. p. 91.)

The jury, therefore, were warranted in finding that the defendant had *never advised* the troop train of the changed situation of the passenger train, and were warranted in finding the defendant negligent in the discharge of its duty to its passengers in failing so to do.

The defendant attempts to negative the effect of this *gross inertia* of the officials in a time of *extreme peril*, by the belated words and acts of the conductor of the passenger train at the time of the attack.

To avail the defendant, it must appear that the jury could arrive at no other reasonable conclusion than that the troops were told that there were no revolutionists on the train, that they were not told *too late* and were told *under circumstances* to make it available.

The Court of Appeals stated:

> "We think the case was properly submitted to the jury; that it could not be said there was no evidence from which it might reasonably be found that the defendant was negligent and that its negligence was the cause of the plaintiff's injury."

According to the testimony of Ramsay, quoted in defendant's petition for rehearing (Rec. p. 111), when *first* asked on direct examination what train he had, he did not state in his answer that he said to the officers that there were no revolutionists on the train. His whole answer was

> "I advised him (the officer), that we had the regular passenger train from San José to Limon."

Although Ramsay, according to the testimony quoted in the defendant's petition for rehearing (Rec. p. 111), the *second* time he was asked the question on direct examination, added to his answer the statement that "there were no revolutionists on board," the statement was hardly responsive to the question, and the jury could have properly found that it was not said at that time, but later.

Grant's testimony of what Ramsay said was

> "I tell you there are no revolutionists"; or
> "I *tell* you *man* there are no revolutionists on this train" (Rec. p. 16).

The words of Ramsay, testified to by Grant, "I *tell* you *man*," etc., plainly indicate that the officer had expressed or shown distrust, and the jury were warranted in finding that the signal to fire had been given before the statement "no revolutionists on board" was made, and that it was the signal of the officer to fire that called forth that excited remark and the "hollering" that there were no revolutionists on the train.

Grant's testimony (Rec. p. 16):

> "It was one of the officers who started that firing *just after being told that it was the passenger train*,"

is consistent with the understanding that the order of things was that *just after being told what train it was and nothing*

more, the firing began and then the shouts that there were no revolutionists on board followed.

The officers understood, of course, that their orders and instructions must come from the authorities who started them on the expedition or *they would act at their peril.* They had no means of knowing that Ramsay and Veitch were not under the threats and guns of the insurrectionists.

They could not know that Ramsay and Veitch were *not in sympathy* with the insurrectionists.

The existing Government was unrecognized at that time; the people generally were restive under it, and shortly afterwards overthrew it. The military forces of the Government could take no chances of treachery.

For the officers to accept the words of Ramsay and Veitch was to disregard the official advices and to disobey the final orders received.

The meeting of Ramsay, Veitch, and the officers of the troops was not a *peace council.* It was an hysterical situation.

It does not appear what the officers said in reply to Ramsay.

The officers may not have heard the statement that there were no revolutionists or else have heard it *too late.* It is certain that if they heard it, *they did not believe it*, and it was heard *under circumstances that made it unavailable to them;* otherwise they would not have made the attack.

Can it now be said as matter of law that the testimony of Ramsay, referred to by the defendant in its petition, would exonerate the officials of their negligence, constitute a defence, and preclude a finding of negligence as the proximate cause of the accident? In other words, because Ramsay testified, was there no other reasonable conclusion from the evidence than that the officials of the road were not guilty of negligence, and that their negligence was not the proximate cause of the accident?

At what time Ramsay said there were no revolutionists and *under what circumstances* he said it, were *typical jury questions*, and the jury saw and heard the witnesses who described the situation.

THERE WAS NO INTERVENTION OF THE VOLUNTARY ACT OF A THIRD PARTY THAT CAUSED THE ACCIDENT IN THIS CASE, AS CLAIMED BY THE DEFENDANT.

The defendant as a common carrier was transporting Ryan in its own train and by its own employees, which train *symbolized* the enemy of the Government at that time, and which was a challenge to the Government's military forces. The defendant was transporting these military forces at the same time on another train of its own, and knew of the danger to both trains if they met without warning of the changed conditions. The defendant had all the means of giving full warning, and it was its solemn duty to communicate the facts, *all the facts*, and the officials were *guilty of gross inertia and negligence in failing to do so.*

It is true, as the defendant says, that under the law of Costa Rica the defendant was bound to use only ordinary care. That is, of course, a *relative question.* In the situation presented of advancing Government troops in one train upon a *train containing innocent passengers, but supposed to contain the enemy*, nothing short of the greatest care would be ordinary care.

The consequences to the troops and their commanders would have been fatal if the passenger train had still been occupied by the enemy and the latter had succeeded in passing the troop train and getting to the rear.

These were all questions of fact for the jury.

CARE REQUIRED IS COMMENSURATE WITH THE THREATENED DANGER.

The defendant contends that a carrier under the law of Costa Rica is bound to use no more than "ordinary" care, seemingly without relation or reference to the existing conditions.

"The terms 'ordinary care,' 'reasonable prudence,' and

like terms have a relative significance, and cannot be arbitrarily defined. What may be deemed ordinary care in one case may under different surroundings and circumstances be gross negligence. The policy of the law has relegated such questions *to the jury*, under proper instructions from the Court."

Opinion Mr. Justice Lamar in *Grand Trunk Railway Co.* v. *Ives*, 144 U. S. 408, at 417, and cases cited.
Murphy v. *Milford*, 210 Fed. Rep. 137, at 139–140.

The courts no longer draw arbitrary distinctions and classifications of degrees of care or correlative degrees of negligence.

"The theory that there are degrees of negligence, described by the terms slight, ordinary, and gross has been introduced into the law from some of the commentators on the Roman Law. It may be doubted if these terms can be usefully applied in practice. Their meaning is not fixed, nor capable of being so. One degree, thus described, may not only be confounded with another, but it is quite impracticable exactly to distinguish them. Their signification necessarily varies according to circumstances to whose influence the courts have been forced to yield, until there are so many real exceptions that the rules themselves can scarcely be said to have a general operation."

Opinion of Mr. Justice Curtis in *Steamboat New World* v. *King*, 16 How. 469 at 474.

In that case the plaintiff was a passenger gratuitously carried on a boat, when the boiler exploded due to racing with another boat. The Supreme Court in the foregoing opinion goes on to say: "If the law furnishes no definition of the terms gross negligence, or ordinary negligence which can be applied in practice, but leaves it to the jury to determine in each case what that duty was, and what omissions amount to a breach of it, it would seem that imperfect and

confessedly unsuccessful attempts to *define* that duty had better be abandoned. . . ."

PROXIMATE CAUSE IS A QUESTION FOR THE JURY.

The question of whether the defendant's conduct was the *proximate cause* of the plaintiff's injury was for the jury.

"Without doubt, whether a given act or omission is the proximate cause of an injury is ordinarily a question for the jury."

> *Milwaukee etc. Railway Co. v. Kellog*, 94 U. S. 469.

The test of proximate cause is reasonable foreseeability of threatened danger.

"That reasonable foresight of harm is the criterion by which to determine the existence of negligence in a given case is very patent after attention has once been directed to the matter."

> Street: Foundations of Legal Liability, Vol. I, page 101, and cases cited.
>
> *Walters* v. *Merchants' Insurance Company*, 11 Peters 213.
>
> *Clark* v. *Pacific Railway Co.*, 39 Mo. 184.
>
> *Cooper* v. *Hudson River Railroad Co.*, 6 Dever. 375.
>
> *Denny* v. *New York Central R.R.*, 15 Gray, 481.

The defendant's petition (p. 26) concludes with this contention:

> "The result reached by the majority of the Circuit Court of Appeals can be sustained only if a radical change in the long-established principle governing the question of proximate cause is recognized. Such an innovation, it is submitted, should be introduced, if at all, by this court and not by inferior judges so divided that the result in the Circuit Court of Appeals depended on the accidental composition of that court."

NO CONFLICT EXISTS BETWEEN THE RESULT REACHED BY THE CIRCUIT COURT OF APPEALS AND THE DECISIONS RELIED ON BY DEFENDANT RESPECTING THE LAW OF PROXIMATE CAUSE.

This result calls for no "radical change in the long established principle governing the question of proximate cause," as the defence contends. The Circuit Court of Appeals in the case at bar applied the long-established rule of law which is undisputed, that when the act of a third person can be clearly foreseen as the *probable consequence* of the defendant's act or omission, the damage caused by the third person's act can be imputed to the latter.

What the defendant as a reasonable man is bound to anticipate is the natural and probable consequences of his own acts, whether those natural consequences are physical or psychological; whether they are the effects of physical phenomena or of human behavior. In meeting the question of proximate cause, we are dealing with a simple question of fact, not law—namely, probable human behavior under given conditions, a question peculiarly within the province of the jury.

Under the title "III" of the defendant's argument in support of its petition stating that "it is only when the act of a third person can be clearly foreseen as the probable consequence of the defendant's act or omission that the damage caused by the third person's act can be imputed to the other," the following cases are cited:

Scheffer v. *Washington City, Virginia Midland & Great Southern R.R. Co.*, 105 U. S. 249. The plaintiff's testator was injured while he was a passenger on the defendant's railroad. It was alleged that this injury so affected the testator mentally as to cause hallucinations resulting in his suicide. The plaintiffs brought the action to recover damages for his death. The Court said in part, at page 250: "The Circuit Court sustained the demurrer on the ground that the death of the testator was not due to the negligence of the company in the judicial sense which made it liable

under the statute. That the relation of such negligence was too remote a cause of the death to justify recovery, the proximate cause being the suicide of the decedent—his death by his own immediate act." The Court further stated at page 252: "The suicide of Scheffer was not a result naturally and reasonably to be expected from the injury received on the train. It was not the natural and probable consequence, and could not have been foreseen in the light of the circumstances attending the negligence of the officers in charge of the train."

"His insanity, as a cause of his final destruction, was as little the natural or probable result of the negligence of the railway officials as his suicide, and each of these are casual or unexpected causes, intervening *between* the act that injured him and his death."

Cole v. *German Savings & Loan Society* (C. C. A. 8th Circuit, 1903), 124 Fed. 113. The plaintiff, an invitee in a building controlled by the defendant, was shown to the elevator shaft, which was not well lighted, by a boy who was not the regular elevator boy employed by the defendant, but a boy who was a stranger and trespasser, whom the regular elevator boy allowed to operate the elevator without the defendant's knowledge. The Court held that there was no evidence of the defendant's negligence.

Jarnagin v. *Travelers Assurance Co.*, 133 Fed. 892. The plaintiff's intestate was killed by a stranger while he was under arrest. The plaintiff contended that the officers negligently failed to protect the deceased against the attack, and that such negligence was the proximate cause of his death. There was no evidence that the officers had any reason to believe that the life of the deceased was threatened. The deceased held a life insurance policy issued by the defendant which excluded liability *if the insured was killed by the voluntary act of a third person.* The Court held that the proximate cause of the death was the act of a third person.

American Bridge Company v. *Seeds* (C. C. A. 8th Circuit, 1906), 144 Fed. 605. The plaintiff was injured by the blow of a load being hoisted under the direction of the defendant's foreman, the plaintiff's *fellow servant,* who

ordered a load raised suddenly by giving a signal while the plaintiff was still in range to be struck.

The Court refused to instruct the jury to return a verdict for the defendant. The Circuit Court of Appeals held that it was error to refuse to direct a verdict for the defendant; that no evidence of any negligence was shown except on the part of the foreman, who was to be construed a *fellow servant* with the plaintiff, the risk of whose negligence the plaintiff assumed under the fellow-servant rule. It became immaterial to decide whether the act of negligence was the proximate cause of the injury, because the defendant would not be liable in any event.

St. Louis, etc., Ry. v. *Mills*, 271 U. S. 344. This was a suit by Mills, administratrix, to recover damages for the death of her intestate. Intestate was shot to death by striking employees of the defendant railway company. Intestate was a strike-breaker. The accident occurred while intestate was riding home from work on a street-car of the defendant railway company. A sheriff detailed by defendant railway company to guard intestate was with him at the time. Plaintiff's contention was that the railway company, having undertaken to guard the strike-breakers, was bound to furnish adequate protection. Held:

> "The bare fact that the employer voluntarily provided *some* protection against an apprehended danger, by undertaking to do something which involved no special knowledge or skill, can give rise to no inference that it undertook to do more.
>
> "Nor is there evidence from which the jury might infer that petitioner's failure to provide an additional guard or guards was the proximate cause of decedent's death."

The foregoing cases cited by the defendant are not in point; they differ from the case at bar in this essential respect: In the case at bar the defendant was conveying in one train (troop train), military troops *knowing* that their *purpose* was to attack another train (passenger train), believing it to be occupied by the revolutionists.

The passenger train, carrying Ryan with other passengers, and occupied by the revolutionists, was operated by the defendant, who learned, after the troop train had started

out for the attack, that the revolutionists had vacated the passenger train. The defendant moved the troop train and the passenger train, with Ryan on board, towards each other and ordered them to meet, without notifying the troop train that the revolutionists had vacated the passenger train.

So far as the *state of mind* of the troops was concerned, they believed and had every reason to believe that the revolutionists still occupied the passenger train when the trains met. This state of mind was due to the defendant's omission to give to the troop train the information it had acquired of the changed conditions.

The defendant expected that the troops would fire upon the passenger train unless the troops were *advised to the contrary.* The defendant *knew that the passenger train should be freed from that danger, but they took Ryan in the train that was the target for the troops without notifying the troops that the occasion for the attack had been removed.*

The situation was similar to the operation of two trains in opposite directions towards each other on a single track road in ignorance of each other, but known to the officials of the railroad, who, with ample facilities for communication, failed to notify each train of the danger.

In none of the above cases cited by the defendant was the plaintiff and the force which caused the injury *both* in the control of the defendant. In none of those cases was the act which caused the injury *expected* by the defendant under any circumstances to occur. In the case at bar the defendant not only expected but *intended* that the attack should occur unless the defendant intervened with a message to the contrary.

It is respectfully submitted that the writ of certiorari to the Circuit Court of Appeals should be dismissed, and that judgment should be entered for the plaintiff on the verdict in the District Court.

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